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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM R. RAPPS, Individually and as Director of the Missouri Division of Child Support Enforcement, and MICHAEL R. HENRY,

Petitioners,

vs.

GLENDA JACKSON, Individually and on Behalf of Others Similarly Situated, and TERRY SKELTON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a traditional state domestic relations law; § 454.465(2), RSMo 1986, and the policy and practice of the Division of Child Support Enforcement of the Department of Social Services of the State of Missouri in setting the amount of the state debt under the provisions of § 454.465(2), RSMo 1986, is in violation of the supremacy clause of the United States Constitution?

2. Whether a director of the Missouri Division of Child Support Enforcement should be denied qualified immunity from damages in applying a state statute and state policy and practice allegedly in conflict with an alleged unambiguous federal statute and regulation, where there was nothing known in the way of federal appellate decisional law, state law, directives from the federal government or policies and practices of other states, to suggest to the director at the time the respondents' action was brought, which would lead a reasonable director to understand that the policies and practices of the Division were violating some constitutional right of the respondents?

3. Whether a director of the Missouri Division of Child Support Enforcement in the setting of the state debt under the provisions of § 454.465(2), RSMo 1986, and any subsequent negotiation of the "state debt" should be denied absolute immunity from damage claims? [Note: Petitioners reserve the right to argue question three in the event certiorari is granted on both of the above questions, but does not include question three among the reasons for the grant of certiorari.]

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners William R. Rapps, formerly Director of the Missouri Division of Child Support Enforcement of the Department of Social Services of the State of Missouri, and Michael R. Henry, presently serving as the Director of the Division of Child Support Enforcement of the Department of Social Services of the State of Missouri, respectfully pray that a writ of certiorari he issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on October 17, 1991.

OPINIONS BELOW

These cases are consolidated appeals from orders entered by the U. S. District Court for the Western District of Missouri, Central Division, in which the District Court in each case granted motions for summary judgment on the merits on behalf of respondents' Glenda Jackson (Jackson) on August 13, 1990 and then subsequently on behalf of Terry Skelton (Skelton) on August 22, 1990. The opinion of the Court of Appeals for the Eighth Circuit has not been reported. It is reprinted at pp. A-1 of the Appendix. The order of the District Court in *Jackson* is reported at 746 F. Supp. 934 (W.D. Mo. 1990) and 132 F.R.D. 226 (W.D. Mo. 1990) and is reprinted at pp. A-16 of the Appendix. The order of the District Court in *Skelton* is not reported and is reprinted at pp. A-41 of the Appendix.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Eighth Circuit was entered on October 17, 1991. A timely petition for rehearing, with suggestion for rehearing en banc, was filed by the petitioners. The Court of Appeals for the Eighth Circuit entered an order denying the petition for rehearing, with suggestion for rehearing en banc, on January 9, 1992, which is reprinted at pp. A-63 of the Appendix. This petition for certiorari is being filed within ninety days of that date. The court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

Article 6, Clause 2, United States Constitution:

This constitution and laws of the United States which shall be made in pursuant thereof; . . ., shall be the supreme law of the land; and the judges in **every state** shall be bound thereby, anything in the construction or laws of any state to the contrary not withstanding.

42 U.S.C. § 1983 (1988):

Every person who, under color of any state, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the depredation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. § 602(a)(26)(A), (27) (1988):

Because of length of text, reprinted at pp. A-64 of the Appendix.

42 U.S.C. § 656(a)(1) and (2)(A), (B) (1988):

Because of length of text, reprinted at pp. A-64 of the Appendix.

45 C.F.R. §§ 302.50 and 302.53 (1989):

Because of length of text, reprinted at pp. A-65 of the Appendix.

45 C.F.R. § 302.53 [removed] and 45 C.F.R. § 302.56 (1991):

Because of length of text, reprinted at pp. A-66 of the Appendix.

Missouri Revised Statutes § 454.465-1(1)(2) (RSMo 1986):

Because of length of text, reprinted at pp. A-68 of the Appendix.

Missouri Revised Statutes 454.480 (RSMo 1986):

Because of the length of text, reprinted at pp. A-69 of the Appendix.

STATEMENT OF THE CASE

These cases are consolidated appeals involving similar complaints originally brought by the respondent Terry Skelton (Skelton) on June 10, 1988 and subsequently by the respondent Glenda Jackson (Jackson) on January 26, 1989. Each respondent in their complaint requested declaratory and injunctive relief and monetary damages against the director and former director of the Division of Child Support Enforcement of the Department of Social Services of the State of Missouri. The allegations of the complaint were essentially the same in that they alleged that the policy and practice employed by the petitioners and the Division of Child Support Enforcement violated the provisions of 45 C.F.R. § 302.50 and § 302.53 (1989) of the Federal Code of Federal Regulations. As a result, the respondents contended that the policies and practices employed by the petitioners and the Division violated the due process and the supremacy clauses of the Constitution of the United States.[1] In his complaint, the respondent Skelton is asking for monetary damages in the amount of $100,000 compensatory damages and $100,000 punitive damages against the petitioners Rapps and Henry. The respondent Jackson in her complaint is asking for monetary damages in the amount of $100,000 compensatory damages and $750,000 punitive damages against the petitioner Rapps.[2] The Jackson complaint was also brought as a class action and a class has been certified by the District Court.

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[1] The due process issue raised by the respondents was not passed upon by the District Court or the Eighth Circuit Court of Appeals in its opinion.

[2] Citations to the record on appeal in the Eighth Circuit Court of Appeals will be cited to the volume and the appendix as "Volume I, App. ___". Also, citations to the trial transcript will be cited as "Tr. __", and any citation to the exhibits offered by the petitioners at the hearing will be cited as "Def. Exh. __".

The State of Missouri participates in the federal Aid to Families with Dependent Children (AFDC) Program, established by Title IV-A of the Social Security Act, 42 U.S.C. §§ 601-617 (1988). In order to receive federal AFDC funds, the state must adopt a plan for child support enforcement in accordance with the standards set forth in Title IV-D of the Social Security Act and operate a child support enforcement program only in *substantial compliance* with that plan. One of the requirements in a state plan is that as a condition of eligibility for aid, each applicant or recipient will be required to assign to the state any rights to support that the applicant may have on his or her behalf or on behalf of any family member. 42 U.S.C. § 602(a)(26)(A) (1988). The support rights assigned to the state shall constitute an obligation owed to the state by those responsible for providing support. 42 U.S.C. § 656(a)(1) (1988). If there is no court order, the amount of the obligation shall be determined by the state in accordance with a formula approved by the Secretary. 42 U.S.C. § 656(a)(B) (1988).

The United States Department of Health and Human Services (HHS) has adopted regulations to implement the statutory scheme. The pertinent regulation insofar as determining the amount of the support is Regulation 45 C.F.R. § 302.53 (1989). In general, this regulation provides that there shall be formula to be used in determining the amount of the support obligation where there is no court order covering the obligation. Such formula shall take into consideration certain criteria (see A-65 of Appendix). Also, the regulatory process described applies to determining the monthly support obligation, the amount of the arrearage, and the periodic payments against the arrearage. 45 C.F.R. § 302.53(c) (1989) (see A-66 of Appendix).[3]

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[3]Regulation 45 C.F.R. §§ 302.50 and 302.53 (1989) were rescinded by HHS during the pendency of these appeals and new regulation 45 C.F.R. § 302.56 (1991) was adopted by HHS on May 15, 1991 (see pp. A-66 of Appendix).

In accordance with the requirements of Title IV-D of the Social Security Act, the state of Missouri has adopted a plan for child support enforcement which has been approved by the Secretary of HHS. In addition, in accordance with the federal mandate, the state of Missouri has adopted a statutory scheme which provides for the recovery from a non-custodial parent of AFDC benefits paid by the state of Missouri on behalf of the dependent children and the custodian parent. Under the provisions of § 454.465(2), RSMo 1986, the director of the Division of Child Support Enforcement is authorized to set the amount of debt owed by the non-custodial parent ("state debt") at an amount not to exceed the amount of public assistance paid (pp. A-68 of Appendix). In addition, the Division of Child Support Enforcement has authority to set a current support obligation by administrative process under the provisions of § 454.470 and § 454.480, RSMo 1986). The provisions of § 454.480, RSMo 1986, include a formula very similar to the provisions of 45 C.F.R. § 302.53 (see pp. A-69 of Appendix). The Division's policy is to seek child support from all divorced non-custodial parents unless there is a court order that the parent owes no support (Vol. 1 App. 125). The Division begins the administrative process by issuing a notice and finding of financial responsibility concerning the parent's duty to pay support. The amount due for current support is determined by a formula published in the Missouri Code of State Regulations. The non-custodial parent has the right to contest the existence of a duty to support or the amount of the support obligation alleged. If the parent does not respond to the notice, the current support obligation is set by an administrative default order at the amount set forth in the notice. Under the provisions of § 454.465(2), RSMo 1986, the Division may also determine whether the non-custodial parent owes the state reimbursement for AFDC paid on behalf of the children during the period *before* a support obligation was established. This amount is referred to as "state debt." The policy of the Division is to designated the full amount of public

assistance within the last five years as a state debt unless a lower amount is negotiated with the obligor (Vol. 1, App. 134).

The respondent Jackson was divorced from her husband, Clyde Oscar Moore, on April 13, 1983. Three children were born of the marriage and custody of the children was awarded to the father by the Circuit Court of Dunklin County, Missouri in its decree of dissolution (Vol. 1, App. 70). Between January 1, 1986, and December 1, 1988, the custodian father received AFDC and Medicaid (Title XIX) benefits on behalf of the minor children (Vol. 1, App. 97). Thereafter, the Division issued to respondent Jackson a notice and finding of financial responsibility from the Missouri Division of Child Support Enforcement dated January 4, 1989. (Vol. 1, App. 96). Subsequently, the Division sent out an administrative default order against the respondent Jackson stating that the amount of state debt was $11,064.00 which was the amount of public assistance paid from January 1, 1986 through December of 1989. The administrative default order also set the amount of the respondent's current support obligation to be $187.00 per month pursuant to the Missouri Code of State Regulations (Vol. 1, App. 101). Also, the Division made the determination that the respondent Jackson should pay at least the amount of $18.00 per month of the state debt, for total monthly payment of $205.00 (Vol. 1, App. 103). During this period of time, it is the position of the petitioners that the respondent Jackson never paid anything voluntarily on the amount of state debt owed (Vol. 1, App. 115). The respondent Jackson disputes this contention.

Sandra Jean Skelton was separated from the respondent Skelton from approximately October 1, 1982 through December of 1983 (Vol. 2, App. 90). The respondent Skelton paid no child support during this period of time. Also, during this period of time, Mrs. Skelton received public assistance for herself and her children (Vol. 2, App. 90). Subsequently, on January 9, 1984, the Division of Family Services, [the predecessor agency to the

Division of Child Support Enforcement] issued a notice and finding of financial responsibility to the respondent Skelton in which the amount of state debt was set at the amount of public assistance paid to Mrs. Skelton from October 1, 1982 through December 31, 1983, in the amount of $3,915.00 (Vol. 2, App. 90-93). The respondent Skelton received an administrative default order from the Missouri Division of Family Services dated February 7, 1984 (Vol. 2, App. 104). The respondent Skelton never made any payments on the amount of $3,915.00 (Vol. 2, App. 93).

Thereafter, the respondent Skelton again separated from his wife from June, 1986 through August of 1987. Once again, the respondent Skelton paid no child support during this period of time (Vol. 2, App. 94-101). Subsequently, the respondent Skelton received a notice and finding of financial responsibility from the Missouri Division of Child Support Enforcement dated March 12, 1987 (Vol. 2, App. 94-97). Thereafter, the Division sent out an administrative default order against the respondent Skelton stating that the amount of state debt to be $4,072.00 which was the amount of public assistance paid from June 1, 1986 through August 31, 1987 (Vol. 2, App. 99-102). Subsequently, the Division sent out an order on October 30, 1987 to respondent's employer directing it to withhold and pay over money to satisfy the current support obligation and to repay the state debt, which was then in the amount of $8,532.00 (Vol. 2, App. 134-135). Thereafter, through employer withholding and certain tax interceptions, the amount outstanding on the state debt was reduced to $1,593,78 owed by the respondent Skelton. During this period of time, the respondent Skelton did not pay any amount voluntarily on the amount of the state debt owed (Vol. 2, App. 104-105).

In granting motions for summary judgment on the merits on behalf of respondent Jackson on August 13, 1990 and then subsequently on behalf of respondent Skelton on August 22,

1990, the U. S. District Court ordered that all administrative judgments of the division which were not in compliance with 45 C.F.R. § 302.53 (1989) are null and void. Second, the U. S. District Court issued an injunction requiring the Division to promulgate a method to be used to calculate state debt in compliance with 45 C.F.R. § 302.53, and prohibiting the Director from automatically setting the state debt equal to the amount of public assistance. Third, the District Court denied the petitioners' Rapps and Henry's claims of absolute and qualified immunity and held that they were personally liable for monetary damages to the respondents. Lastly, the District Court ordered that by agreement and stipulation, the Director would stay all current actions for collections of administrative determined state debt until the end of 1990 or until the appeals were resolved. (pp. A-39 and A-62 of Appendix).

The orders of the District Court were affirmed by the Court of Appeals for the Eighth Circuit in its judgment and opinion on October 17, 1991. In its decision, the Court of Appeals affirmed the District Court's ruling that the provisions of § 454.465(2), RSMo 1986, and the policy and practice of the Missouri Division of Child Support Enforcement in seeking reimbursement from non-custodial parents of payments in the absence of a court ordered support obligation, rather than using a formula in certain federal regulations to calculate the amount owed, was invalid under the supremacy clause of the Constitution of the United States. The Court of Appeals concluded that the supremacy clause prevents the implementation of a reimbursement policy other than one in accordance with existing federal regulations. The Court of Appeals also denied the petitioners' claim for absolute immunity on the basis that the District Court's reasoning was consistent with that of the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Lastly, the Court of Appeals also briefly denied the petitioners' claim for qualified immunity by concluding that

the federal statute and regulation unambiguously require the Directors to utilize the proscribed formula in setting the state debt. A timely petition for rehearing, with a suggestion for rehearing en banc was filed by the petitioners. The Court of Appeals for the Eighth Circuit entered an order denying the petition for rehearing, with suggestion for rehearing en banc, on January 9, 1992 (pp. A-63 of Appendix). This petition for certiorari is being filed within ninety days of January 9, 1992. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Is In Conflict With Decisions Of This Court And Other Circuits Concerning Federal Preemption Of A Traditional State Domestic Relations Law And Demonstrates The Need For A Definite Ruling By This Court On The Preemptive Force Of Federal Child Support Provisions For The Reason That There Are Numerous Other States Which May Have Similar Statutes, Policies And Practices As The State Of Missouri.

In granting motions for summary judgment on the merits on behalf of the respondents' Jackson and Skelton, the U. S. District Court nevertheless recognized that the Supreme Court has not ruled on the preemptive force of the federal child support enforcement provisions (pp. A-27 and A-48 of Appendix). Notwithstanding, the Eighth Circuit Court of Appeals has affirmed the decision of the trial court that the provisions of § 454.465(2), RSMo 1986, and the policy and practice of the Missouri Division of Child Support Enforcement are invalid under the supremacy clause of the United States Constitution. The Eighth Circuit generally affirmed on the ground that the supremacy clause prevents the implementation of a reimbursement policy other than one in accordance with existing federal regulations, but made *no findings* that there was any congressional intent to preempt state law or that the policies and practices of the Missouri Division of Child Support Enforcement caused any major damage to any clear and substantial federal interest. It should be noted that the decision of the Eighth Circuit could have an effect upon numerous other states who may have similar policies and practices as the state of Missouri. In this regard, in the proceedings before the Eighth Circuit, the states of Arizona, Florida and Hawaii submitted an amicus curiae brief in support of the position of the Missouri Division of Child Support

Enforcement. In their brief, the amici pointed out that numerous states have statutes making a non-supporting parent liable to the state for full reimbursement of public assistance. See, *e.g.*, Fla. Stat. Ann. § 409.2561 (Supp. 1990); Ga. Code Ann. 19-119-5 (1990); Haw. Rev. Stat. § 346.37.1 (1985), and § 576E-11 (Supp. 1989); Miss. Code Ann. § 43-19-31 (1990); Mont. Code Ann. §§ 53-2-613, 53-4-248 (1989); N. C. Gen. Stat. §§ 110-135 (1990); Okla. Stat. Tit. 56, § 238.1 (1989); Or. Rev. Stat. § 416.410 (1989); and Va. Code Ann. §§ 53.1-250, 63.1-251 (Supp. 1990). In the state of Missouri alone, the effect of the Eighth Circuit's decision may be that as many as approximately 46,000 orders entered in Missouri could be void, and that as a result of spin-off lawsuits in Missouri and other states, there could be a substantial reduction of program accounts receivables, and that previous program resources may have to be shifted to defending these suits and redetermining old debts, which could severely effect child support program performance in Missouri and other states, and result in financial hardship for children and single parent families. *Such a drastic decision by the Eighth Circuit deserves this Court's attention!*

In the case of *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802 (1979), one of the issues before this court involved the application of community property rules in the state of California, and whether or not under the supremacy clause, California was required to defer to the statutory scheme of the Railroad Retirement Act for allocating benefits. In its opinion, the Court stated in part at 99 S. Ct. 808 as follows:

> . . . on the rare occasion when state family law has come into conflict with a federal statute, this court has limited review under the supremacy clause to a determination whether Congress has 'positively required by direct enactment' that state law be preempted *Whetmore v. Markoe*, 196 U.S. 68, 77, 25 S. Ct. 172, 176, 49 L.Ed. 390 (1904). A mere conflict in words is not sufficient. State family and family property

> law must do 'major damage' to 'clear and substantial federal interest before the supremacy clause will demand that state law be overridden.' *United States v. Yzell*, 382 U.S. 341, 352, 86 S. Ct. 500, 507, 15 L.Ed.2d 404 (1966).

In *Rose v. Rose*, 481 U.S. 691, 107 S. Ct. 2029 (1987), this Court held that Tennessee's garnishment law, which had been used to garnish a veteran's disability benefits of the noncustodial parent, was not preempted by conflicting provisions of federal law that prohibited or restricted the attachment of such benefits for child support purposes. In reaching this conclusion, the Court observed that domestic relations law, including child support, has long been recognized as primarily an area of state law, not federal law. *Rose*, at 481 U.S. 625. In affirming the decisions of the District Court, the Eighth Circuit essentially did not follow the reasoning of the trial court, but instead applied a different preemption analysis to an area of traditional state concern such as domestic relations, child support, and the cases at bar. The Eighth Circuit relied primarily on the decision of *King v. Smith*, 392 U.S. 309, 88 S. Ct. 2188, 20 L.Ed.2d 1118 (1968), *Townsend v. Swank*, 404 U.S. 282, 282-286, 92 S. Ct. 502, 30 L.Ed.2d 448 (1971), and *Planned Parenthood of America v. Heckler*, 712 F.2d 650 (D.C. 1983) for the proposition that the Missouri statute and the policy and practice of the Missouri Division of Child Support Enforcement were in conflict with the federal statute and regulation and therefore were invalid under the supremacy clause. The foregoing decisions are distinguishable from the case at bar for the reason that Missouri's policy regarding unreimbursed AFDC payments does not restrict or pose any threat to the eligibility of individuals to receive child support enforcement services under Title IV-D. Further, these decisions were rendered *before* the federal regulations that the respondents rely upon, were adopted in 1975. Also, in the case of *Planned Parenthood of America v. Heckler, supra,* the appellants in that case argued that a federal regulation merely clarified

that state law had not been preempted by federal law. The factual situation in that case is clearly distinguishable from the cases at bar. Therefore, the foregoing decisions from this Court relied upon by the Eighth Circuit in its opinion do not address the issue of the preemptive force of federal child support enforcement provisions in regard to a traditional state domestic relations law, such as the Missouri statute and the policies and practices of the Missouri Division of Child Support Enforcement.

The Eighth Circuit also cites the case of *Gorrie v. Bowen*, 809 F.2d 508 (8th Cir. 1987) as authority for its decision. However, it is the view of the petitioners that this case is actually authority for their position and that the Eighth Circuit did not follow its own reasoning in *Gorrie*. In this case, applicants and recipients of AFDC benefits sued, challenging regulations requiring minor siblings to be included as part of an assistant unit when they resided in the same house as the applicant. The regulations were promulgated under the authority of the Deficit Reduction Act of 1984 codified at 42 U.S.C. § 602(a)(38) (Supp. III 1985). Among other matters, the Commissioner of the Minnesota Department of Human Services argued that the family unit filing regulation conflicted with the state's traditional authority over matters concerning child support and therefore violated the Tenth Amendment to the Constitution. The Eighth Circuit Court of Appeals rejected the Tenth Amendment argument and also commented that the case did not present the classic preemption question of whether a congressional enactment precluded state regulation on the same subject, but instead the question related to the conditions that had been placed on state programs supported by federal funds and whether the supremacy clause obliged it to comply with federal AFDC requirements. *Id.* at 520. *However*, the Eighth Circuit then proceeded to determine whether there was a conflict between state law and a federal law or regulation and concluded that it was presented with a conflict between state and federal law and with the question of whether

the supremacy clause caused 42 U.S.C. § 602(a)(38) (Supp. II 1985) to override state child support provisions. *Id.* at 521. The Eighth Circuit then found that there *was* congressional intent from the legislative history of the Deficit Reduction Act of 1984 to occupy the field and that Congress intended to reach child support when it enacted § 602(a)(38) (Supp. III 1985). The Eighth Circuit then concluded that there was a substantial federal interest in reducing federal expenditures represented by the Deficit Reduction Act of 1984 and that the state child support laws insofar as they restrain the use and distribution of child support payments in a manner contrary to § 602(a)(38) (Supp. III 1985) did major damage to a substantial federal interest. However, as was previously pointed out, the Eighth Circuit's opinion in the cases at bar makes *no finding* that there was any congressional intent to preempt state law or that § 454.465(2), RSMo 1986, and the policies and practices of the Division of Child Support Enforcement caused any major damage to any clear and substantial federal interest. It should also be noted that the factual situation in *Gorrie* is *not applicable* to the cases at bar. *Unlike* the situation in the state of Minnesota, enforcement of state law in Missouri and the policy and practice of the Division of Child Support Enforcement in these cases does not result in any major damage to the Deficit Reduction Act of 1984 and was never at issue in these cases.

The Court's attention is also directed to the decision of *Kitchens v. Bowen*, 825 F.2d 1337 (9th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988). In this case, punitive fathers brought an action against the Department of Health and Human Services and Oregon defendants to challenge the constitutionality of the failure to require notice and an opportunity to be heard upon the mother's application for AFDC benefits. The Ninth Circuit Court of Appeals sustained the decision of the District court in dismissing the action. In discussing the legislative history of the child support enforcement program, the Court pointed out that

support rights assigned to the state under the AFDC program constitute "obligations owed to the state and are collectible by the state under relevant and state and local processes. 42 U.S.C. § 656(a)(1) (1988). 825 F.2d 1339. In addition, the Ninth Circuit suggested in part that the entire AFDC program alone is designed to leave the states responsible for the specific procedures to be employed, subject only to the broad parameters outlined in the federal statutes and regulations. 825 F.2d 1340. The Ninth Circuit concluded that the realm of domestic relations is and has been traditionally governed by state law. [citations omitted]. Further, the argument by the appellants that there was a compelling need for national uniformity in this area that overrode any state interest *failed* as there was nothing in the statutory scheme to indicate a "clear and manifest" intent on the part of Congress to preempt the field. *Id.* at 1341. It is submitted that similar reasoning is applicable to the cases at bar.

The following comments concerning the legislative history of the child support enforcement amendments of 1984, P. L. 98-378, Vol. 4, U. S. Code Cong. & Admin. News, were made in part at pp. 2401, 2403:

> When the committee on finance reported amendments in 1974 to provide for the establishment of the child support enforcement program, it observed:
>
> "The enforcement of child support obligations is not an area of jurisprudence about which this country can be proud.'
>
> * * *
>
> The committee's proposal to create a new child support enforcement program reflected a desire to improve in a very significant way the collection of support on behalf of children with absent parents. In presenting this rationale for the new program, the committee stated:

> 'The committee believes that all children have the right to receive support from their fathers. The Committee bill . . . is designed to help children attain this right, including the right to have their fathers identified so that support can be obtained. The immediate result will be a lower welfare cost to the taxpayer but, more importantly as an effective support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family break up.'
>
> * * *
>
> 'The structure of the program has not changed since its inception. Basic responsibility for child support and establishment of paternity is left to the states, but the federal government also plays a major role in monitoring and evaluating state programs, providing technical assistance, and, in certain instances, in undertaking to give direct assistance to the states in locating absent parents and obtaining support payments from them. The program provides child support enforcement services for both welfare and non-welfare families.

The provisions of § 454.465(2), RSMo, and the policy practice of the Missouri Division of Child Support Enforcement in setting the amount of the state debt under the provisions of § 454.465(2), RSMo, do not do any "major damage to any clear and substantial federal interest". On the contrary, the policies and practices of the Missouri Division of Child Support Enforcement are not only in harmony with the congressional intent of promoting child support enforcement legislation, but actually *promote* the federal interest of enforcing support obligations owed by absent parents to their children, of lowering welfare costs to the taxpayer, and of establishing respect for the legal system, which often has lacked the authority, will and resources to provide effective remedies.

As a result, the decision by the Eighth Circuit has allowed the respondents to escape their burden of proof as to whether or not Congress intended to preempt the field of child support enforcement concerning the reimbursement from non-custodial parents of payments made under the Aid to Families of Dependent Children Program. In addition, the Eighth Circuit in its opinions made *no finding* that § 454.465(2), RSMo 1986, and the policies and practices of the Missouri Division of Child Support Enforcement caused any major damage to any clear and substantial federal interest. These petitioners respectfully suggest that contrary to the reasoning of the Eighth Circuit, and in paraphrasing the teaching of this Court in *Hisquierdo*, that a "mere conflict in words is not enough", but in the area of state family and family property law, there must be "major damage" to "clear and substantial federal interest" before the supremacy clause will demand that a state law be overridden. Therefore, even if there is a conflict between federal regulations and the provisions of § 454.465(2), RSMo, and the policies and practices of the Missouri Division of Child Support Enforcement, to which these petitioners *strongly disagree*, it is submitted that the Eighth Circuit was still required to find that the state law and policies and practices of the Missouri Division caused "major damage" to a "clear and substantial federal interest". The Eighth Circuit has thus created a confusing precedent, likely to generate even further confusion among the other circuits. It is a precedent at odds with this Court's ruling in *Hisquierdo* and *Rose, supra*, and the legislative history of the child support enforcement amendments of 1984. Plenary consideration of this matter by the Court is *essential*.

II.

The Decision Below Is In Conflict With Decisions Of This Court Concerning The Doctrine Of Qualified Immunity And Guidance From This Court Is Needed In That The Effect Of The Eighth Circuit Decision Is Not Only To Subject Missouri Officials To Potentially Huge Sums Of Money Damages, But Also Place At Risk Officials In Numerous Other States Who May Have Statutes And Child Support Enforcement Policies Similar To The State Of Missouri, And Any Other Official In the Joint Federal State Program Involving The Very Complex And Comprehensive Area Of Child Support Enforcement.

In its opinion, the Eighth Circuit sustained the orders of the District Court in denying the petitioners' claims of qualified immunity. The reasoning of the Eighth Circuit appears to be that the federal statute and regulations unambiguously require the Missouri directors to utilize the prescribed formula in setting the state debt, and therefore the directors are not entitled to qualified immunity (pp. A-14 of Appendix). The Eighth Circuit's opinion is otherwise very brief and there is very little discussion on this issue. *The petitioners were "stunned" by the Eighth Circuit's opinion!* The effect of the Eighth Circuit's decision is not only to subject Missouri's officials to potentially huge sums of money damages, but also place at risk officials in numerous other states who may have similar statutes and child support enforcement policies as the state of Missouri, and *any other official* in the joint federal state program involving the very complex and comprehensive area of child support enforcement. These petitioners respectfully and earnestly submit that the Eighth Circuit Court erred in its opinion and that guidance from this Court is needed by all public officials as to the Eighth Circuit's very narrow interpretation of the doctrine of qualified immunity.

As the Court is aware, the rule of qualified immunity states that "government officials performing discretionary functions

generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have know." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). An official is not expected to anticipate the laws' development or its possible application to a unique situation. *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738. Subsequently in *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987), a suit was brought against an FBI agent seeking damages resulting from the warrantless search of a resident's home. The District Court granted summary judgment on behalf of the FBI agent on the basis of qualified immunity which was reversed by the Eighth Circuit Court of Appeals in *Creighton v. Paul*, 766 F.2d 1269 (8th Cir. 1985). Thereafter, this Court granted certiorari and reversed the decision of the Eighth Circuit Court of Appeals. In its opinion, this Court clarified its standards for qualified immunity and pointed out that there must be a "particularized" showing that "a reasonable official" would understand that what he was doing violates that right. 483 U.S. at 640, 107 S. Ct. at 3039. In addition, this was not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it was to say that in light of preexisting law the unlawfulness must be apparent. 483 U.S. at 640, 107 S. Ct. at 3039. Further, although the test for qualified immunity is an objective one, it is proper for a court to consider the particular circumstances of an official's actions. 483 U.S. at 641, 107 S. Ct. at 3041 (determination of whether it was objectively legally reasonable to conclude that a particular search was supported by probable cause required taking into consideration the information possessed by the searching officials).

Applying the principles of *Creighton* to the cases at bar, it is respectfully submitted that the information available to the petitioners could *not* have led a reasonable director of the

Missouri Division of Child Support Enforcement to understand that the policy and practices of the Division were violating some constitutional right of the respondents or that in the light of preexisting law the unlawfulness of the action was apparent. In this regard, the District Court recognized in its orders that this court has not ruled on the preemptive force of the federal child support enforcement provisions (pp. A-27 and A-48 of Appendix). Instead, the District Court suggested that prior litigation challenging the same DCSE procedure being challenged in the cases at bar imputed knowledge to the petitioners that the DCSE policy was not in compliance with the federal regulations. The District Court was *plainly wrong* on this issue as there was *never* any finding or legal determination by the District Court or the Eighth Circuit Court of Appeals that the policies and practices of the Division of Child Support Enforcement were contrary to federal statute or federal regulations or preempted by the supremacy clause prior to the cases at bar. *Shipman v. Missouri Division of Family Services,* 588 F. Supp. 1203 (E.D. 1984), *vacated and remanded*, 782 F.2d 1048 (8th Cir. 1985) and *Shipman v. Missouri Department of Family Services*, 877 F.2d 678 (8th Cir. 1989). It is significant that the Eighth Circuit in its opinion did not even discuss this litigation or cite it as authority for the reasoning in its opinion. As a result, prior to the District Court decision in these cases and this Eighth Circuit opinion, no federal court had evaluated this specific issue on appeal. This was recognized by counsel for the respondents and the following is an exact quotation from a letter dated June 16, 1990 from counsel for the respondents to the District Court:

> These cases are matters of first impression in the country and have not been addressed elsewhere. (Volume 2, App. 114).

Thus, even if the Eighth Circuit's opinion is correct, it would be *novel*, and in the light of preexisting decisional law, the alleged unlawfulness of the petitioners' action is *not apparent.*

In addition, even if the Eighth Circuit opinion is correct in its interpretation that the statute and regulation are unambiguous, to which these petitioners *strongly disagree*, application of that statute and regulations to the policy and practice of the Division of Child Support Enforcement is *not clear* so as to lead a reasonable director to understand that he was violating some constitutional right of the respondents. In this regard, it was pointed out to the District Court in the hearing that there had been no federal agency which has criticized the Missouri State Plan or refused to approve it because it lacked a formula to be used to determine the amount of indebtedness or monthly payment pursuant to the Missouri state collection provisions. Section 454.465(2), RSMo 1986 (Tr. 45, Def. Exh. C). Further, the petitioners *did adopt* a formula and it has been incorporated into the state plan. However, with apparently the concurrence of the federal government, it has been the petitioners' interpretation that the formula was not applicable to the setting of the state debt under the provisions of § 454.465(2), RSMo 1986. The statutory provision under attack by the respondents in these cases is § 454.465(2), RSMo 1986. In the view of the petitioners, this statutory provision is the codification of the common law action for necessaries. The courts in Missouri have recognized that there is a fundamental difference between child support and an action for necessaries. *State ex rel. Division of Family Services v. Stanridge*, 676 S.2d 513 (Mo. banc 1984); *State of Missouri, Division of Family Services v. Hollis*, 639 S.W.2d 389 (Mo. App., Spr. 1982). Therefore, when the Division proceeds under § 454.465(2), RSMo 1986, the state of Missouri is no different than any other creditor. Moreover, as was previously suggested, it is significant to note that there are numerous other states which may have similar statutes and policies and practices as the State of Missouri.

In *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L.Ed.2d 411 (1985), this Court held that the United States

Attorney General was entitled to qualified immunity for the reason that the legality of a warrantless domestic security wiretap that Mitchell had authorized in November of 1970 was, at the time an open question, and *Harlow* teaches that officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted. 472 U.S. 534, 105 S. Ct. 2820. This Court further pointed out that the District Court's conclusion that Mitchell was not immune because he gambled and lost on the resolution of an open question departed from the principles of *Harlow* and such hindsight reasoning on immunity issues was precisely what *Harlow* rejected. 472 U.S. 534, 105 S. Ct. 2820. The decisive fact was not that Mitchell's position turned out to be incorrect, but the question was open at the time he acted. *Id.* Applying these principles to the cases at bar, the issue in this case is "novel" and the petitioners should not be expected to anticipate the law's development or its possible application to a unique situation. Further, the petitioners did not "gamble" for the reason that they simply had no reason to believe that they were involved in a "gamble situation". In this regard, there was nothing known in the way of *federal appellate decisional law, state law, directives from the federal government,* or *policies and practices of other states*, to suggest to the petitioners *at the time the respondents' action was brought* which would lead a reasonable director of the Missouri Division of Child Support Enforcement to understand that the policies and practices of the Division were violating some constitutional right of the respondents.

Under the Eighth Circuit's narrow reading of *Harlow, Mitchell*, and *Anderson*, governmental defendants will now be at a substantial disadvantage in raising the issue of qualified immunity, the right not to stand trial, decided before being faced with the burden of expense and trial preparation. Such an approach will thus avoid the doctrine of qualified immunity enunciated by this Court in *Harlow*. Here, the Court has recognized the utility of the

doctrine stating that it would "permit the resolution of many insubstantial claims on summary judgments" thus shielding public officials from the consequences of litigation. 457 U.S. 817-18, 102 S. Ct. at 2737-38. These consequences include the "general cost of subjecting officials to the risk of trial, distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.* at 816, 102 S. Ct. at 2737. In these underlying cases, the respondents' own attorney concedes that this is a "unique situation" calling the issue presented one of "first impression". (Vol. 2, App. 114). The law can hardly be clearly established to subject the petitioners to possible damage liability, when the case is one of first impression.

At the close of oral argument, it is the recollection of counsel for the petitioners in the Eighth Circuit that one of the judges on the panel made a general comment to the effect that "this is a tough case". *The petitioners would agree that this is a tough case.* However, with the benefit of "twenty/twenty hindsight", the Eighth Circuit has refused to give the benefit of doubt to the petitioners and has now concluded that they may be subject to the payment of a potentially huge sum of money damages involving a novel question relating to a federal statute and regulation. Under such circumstances, the Eighth Circuit's opinion is *unfair, impractical and contrary to sound public policy* to require officials involved in federal-state programs to be in total compliance with a federal statute or regulation on pain of money damages where they are called upon to administer complex statues and regulations, which often are voluminous, ambiguous and contradictory and without the guidance of federal decisional authority and directives from the federal government. The Eighth Circuit's opinion is directly at odds with this Court's ruling in *Harlow, Mitchell* and *Anderson* and now places all governmental defendants in jeopardy and guidance from this Court is *critical.*

CONCLUSION

For these reasons, petitioners William R. Rapps and Michael R. Henry respectfully request that this petition for writ of certiorari be granted and that the decision of the Eighth Circuit Court of Appeals be reversed.

Respectfully submitted,

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February, 1992

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2604

Glenda Jackson, individually
and on behalf of others similarly situated,
Appellee,

v.

William R. Rapps, individually
and as Director of the
Missouri Division of Child Support Enforcement,
Appellant.

No. 90-2605

Terry Skelton,
Appellee,

v.

William R. Rapps, individually
as as Director of the
Missouri Division of Child Support Enforcement,
Appellant.

Appeals from the United States District Court
for the Western District of Missouri.

Submitted: April 11, 1991
Filed: October 17, 1991

Before JOHN R. GIBSON and BOWMAN, Circuit Judges, and HANSON,* District Judge.

JOHN R. GIBSON, Circuit Judge.

The issue in this case is the validity of the policy and practice of the Missouri Division of Child Support Enforcement to seek reimbursement from noncustodial parents of the entire amount of payments made under the Aid to Families of Dependent Children program in the absence of a court-ordered support obligation, rather than using the formula in the federal regulations to calculate the amount owed. Glenda Jackson and Terry Skelton filed separate actions under 42 U.S.C. § 1983 (1988) against the former and present directors of the Missouri Division of Child Support Enforcement challenging the directors' policy of attempting to collect the full benefits paid under the AFDC program and alleging that the policy violated federal regulations. The district court[1] granted partial summary judgment to the plaintiffs, holding that the federal regulations preempted the directors' policy and practice of attempting to collect the total amount of AFDC benefits paid. The court also denied the directors' cross-motions for summary judgment on the plaintiffs' claims for damages, ruling that the directors were not entitled to absolute or qualified immunity. We affirm on the ground that the supremacy clause prevents the implementation of a reimbursement policy other than one in compliance with existing federal regulations.

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* The HONORABLE WILLIAM C. HANSON, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

[1] The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

The State of Missouri participates in the joint state-federal AFDC program authorized by Title IV-A of the Social Security Act, 42 U.S.C. §§ 601-615 (1988). As a condition of federal funding, the state must comply with the requirements of federal statutes and regulations governing the AFDC program. The State is required to submit a state plan providing written assurances to the Secretary of the Department of Health and Human Services that its plan complies with the requirements of the federal statutes and regulations governing the AFDC program. 42 U.S.C. §§ 601-602. The State is required to adopt a child support enforcement program in "substantial compliance" with Title IV-D of the Social Security Act, 42 U.S.C. § 651-665. 42 U.S.C. § 602(a)(27). The Missouri Division of Child Support Enforcement is responsible for the enforcement of child support obligations. *See* Mo. Rev. Stat. § 454.400 (1986). The Director of the Division is responsible for adopting policies and regulations for implementing the state's plan and for ensuring compliance with the federal program.

To become eligible for AFDC benefits, an applicant must assign "support rights" to the state. 42 U.S.C. § 602(a)(26)(A); Mo. Rev. Stat. §208.040(2)(2) (Supp. 1990). Support rights assigned under section 602(a)(26) constitute an obligation owed to the State. 42 U.S.C. § 656 (1988). The amount of the obligation is set by a court order for support, unless there is no court order covering support rights. 42 U.S.C. § 656(a)(2). In that instance, the obligation shall be "determined by the State in accordance with a formula approved by the Secretary." 42 U.S.C. § 656(a)(2)(B).[2] The formula adopted by the Secretary

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[2] 45 C.F.R. § 302.50 (1990) describes the method for establishing and recovering support obligations:

The State plan shall provide as follows:

(a) The support rights assigned to the IV-D agency pursuant to § 232.11 of this title or section 471(a)(17) of the Act constitute an obligation

(Footnote 2 continued on next page)

for setting the amount of the support obligation in the absence of a court order setting the amount is contained in 45 C.F.R. § 302.53(a) (1990), which provides that the formula must take into consideration:

(1) All earnings, income and resources of the absent parent including real and personal property;

(2) The earnings potential of the absent parent;

(3) The reasonable necessities of the absent parent;

(4) The ability of the absent parent to borrow;

(5) The needs of the child for whom the support is sought;

(6) The amount of assistance which would be paid to the child under the full standard of need of the State's IV-A plan;

(7) The existence of other dependents; and

(Footnote 2 continued)

owed to the State by the individual responsible for providing such support. Such obligation shall be established by:

(1) Order of a court of competent jurisdiction,

(2) Other legal process as established by State laws, such as an administrative hearing process or a legally enforceable and binding agreement . . . .

(b)The amount of the obligation described in paragraph (a) of this section shall be:

(1) The amount specified in the order of a court of competent jurisdiction which covers the assigned support rights; or

(2) If there is no court order, an amount determined in writing by the IV-D agency [in Missouri, the Division of Child Support Enforcement] as part of the legal process refereed to in paragraph (a)(2) of this section in accordance with a formula which meets the criteria prescribed in § 302.53.

(8) Other reasonable criteria which the State may choose to incorporate.

Missouri's state plan for child support enforcement originally stated that when no court order addressed the duty to provide support, the State would administratively establish support arrearages. The amount of support arrearages was called the "state debt." Mo. Rev. Stat. § 454.465 (1982 Supp.) The original Missouri statute did not require the use of a formula in establishing the amount of the state debt, but defined "state debt" as the "amount equal to the amount of public assistance: paid out. *Id.* In 1984, the Missouri General Assembly amended the 1982 enactments, and at that time, authorized the Director to set the state debt in "an amount not to exceed the amount of public assistance" paid. Mo. Rev. Stat. §454.465(2) (1986). The policy of the Division is to designate the full amount of public assistance paid out over the last five years as state debt unless a lower amount is negotiated with the noncustodial parent.

Both Terry Skelton and Glenda Jackson are divorced or separated parents who do not have custody of their children, and whose children received AFDC benefits. Neither Skelton nor Jackson had been ordered to pay child support. Each received a notice and finding of financial responsibility from the Missouri Division of Child Support Enforcement. The notices each set the amount of the state debt owing at the total amount of public assistance paid out to their minor children. Jackson received notice that she was responsible for repaying the state $11,064.00 as state debt. Skelton's state debt was administratively set at $4,072.00. Neither responded to the notice and both received an administrative default order setting liability for the state debt in amounts equal to the public assistance paid out to their minor children.

Skelton and Jackson brought separate actions against Rapps and Henry, former and present directors of the Division of Child

Support Enforcement of the Department of Social Services. Skelton and Jackson each sought relief from the administrative orders establishing the amount of state debt as the total amount of public assistance paid on behalf of their children. Skelton and Jackson sought declaratory and injunctive relief as well as monetary damages against the directors, claiming that Mo. Rev. Stat. § 454.465(2) and the directors' policy and practice of setting the state debt at the total amount of AFDC benefits paid violated the provisions of 45 C.F.R. §§302.50 and 302.53 and the due process and supremacy clauses. Jackson later brought a class action, and the court certified a class consisting of noncustodial parents whose children receive or have received AFDC benefits through the State of Missouri pursuant to the post-1984 amended statute, Mo. Rev. Stat. § 454.465, whose support obligations have not been established by a court order, and whose "state debt" was set by the Director without consideration of the formula mandated by 45 C.F.R. §§ 302.50 and 302.53. *Jackson v. Rapps,* No. 89-4022-CV-C-5, judgment (W.D. Mo. Aug. 13, 1990).

The district court granted Skelton's and Rapp's summary judgment motions, holding that the supremacy clause preempted Mo. Rev. Stat. 454.465(2) and the Division's policy and practice.[3] *Jackson v. Rapps,* No. 89-4022-CV-C-5, slip op. at 21 (W.D. Mo. Aug. 13, 1990); *Skelton v. Rapps,* No. 88-4232-CV-C-5, slip op. at 17 (W.D. Mo. Aug. 22, 1990). The court entered a judgment that: (1) declared all administrative judgments of the Division which did not comply with 45 C.F.R. § 302.53 null and void; (2) required the Division to promulgate a method for calculating state debt in compliance with 45 C.F.R. § 302.53; and (3) prohibited the Director from automatically setting state debt at the amount of public assistance paid out by the state. *Skelton,*

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[3] In light of this ruling, the district court did not consider whether a due process violation also occurred. *Jackson*, slip op. at 28; *Skelton*, slip op. at 26.

slip op. at 28. The court also denied the directors' motions for partial summary judgment on plaintiffs' claims for damages, holding that the directors are not entitled to absolute or qualified immunity. *Jackson*, slip op. at 27; *Skelton*, slip op. at 24-25. This appeal followed.[4]

I.

The directors first argue that the district court erred in holding that the provisions of section 454.465(2) and the division's policy and practice are preempted under the supremacy clause. The directors argue that preemption is not appropriate under the analysis of *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984), because there is: (1) no congressional intent to preempt state law; (2) no actual conflict between the state law and federal regulations; and (3) the policies and practices of the division and section 454.465 do not cause any major damage to any clear and substantial federal interest.

Jackson and Skelton respond that although the state statute is preempted by federal law under the *Capitol Cities* analysis, such an analysis is not even necessary, when, as here, the state statute and policy do not conform with federal program regulations.

In *Townsend v. Swank*, 404 U.S. 282 (1971), the Supreme Court held that Illinois' definition of a "dependent child: was inconsistent with the federal definition required by the AFDC program. *Id.* at 284-85. The Court, without engaging in a preemption analysis, simply concluded that the Illinois statute and regulations conflicted with the federal statute and therefore were invalid under the supremacy clause. *Id.* at 285-86.

Similarly, in *King v. Smith*, 392 U.S. 309 (1968), the Court invalidated a state regulation which defined "parent" in a manner

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[4] The district court certified the decision for immediate appeal pursuant to 28 U.S.C. § 1292(b) (1988).

inconsistent with the definition set forth in the Social Security Act. *Id.* at 333. Again, the Court did not employ a preemption analysis, but instead simply reasoned:

> There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid.

Id. at 333 n.34. (citations omitted)

In *Gorrie v. Bowen,* 809 F.2d 508 (8th Cir. 1987), we considered whether a regulation of the Secretary of Health and Human Services requiring that applications for public assistance for AFDC benefits include siblings living in the same household conflicted with the state's authority over child support obligations. Although this court stated that the issue did "not present the 'classic' preemption question of whether a congressional enactment precludes state regulation of the same subject," *id.* at 520, we went on to utilize a preemption analysis to determine whether a conflict between federal and state law existed, stating:

> "The question here related to the conditions that Congress has placed on state programs supported by federal funds." The State voluntarily accepts the conditions imposed by Congress and, once it chooses to do so, the supremacy clause obliges it to comply with federal AFDC requirements.

Id. (citations and footnote omitted).

Similarly, the District of Columbia Circuit stated in *Planned Parenthood Federation v. Heckler,* 712 F.2d 650 (D.C. Cir. 1983):

> It is elementary that under the Supremacy Clause of the Constitution states are not permitted to establish eligibility standards for federal assistance programs that conflict with the existing federal statutory or regulatory scheme.

Id. at 663-64. The court rejected the argument made in that case that a regulation issued by the Secretary of Health and Human Services, requiring Title X grantees to comply with prevailing state law as to parental notification or consent, merely clarified the fact that the state law was not preempted by federal law. *Id.* at 664 n.57. The court explained:

> This case presents no direct conflict between two bodies of law, one state and one federal. We have only a *voluntary* federal funding program with specific eligibility requirements. The law on this issue is clear: Even if Congress permits the States to impose additional rules as to eligibility for federal funding, those rules must be consistent with the federal standards or else be held invalid under the Supremacy Clause.

Id. (citing *Townsend,* 404 U.S. at 286) (emphasis in original).

The directors and amici[5] argue that there is no actual conflict between Mo. Rev. Stat. §454.465(2) and the federal regulations, and thus, the cases cited above have no bearing on the issues here.[6] They contend that no conflict exists because the federal

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[5] The State of Arizona submitted an amicus curiae brief also arguing that the district court erred in holding Missouri's statute and practice preempted by federal regulations.

[6] They further argue that the decisions are factually distinguishable because those decisions dealt with state limitations on the eligibility of individuals to receive benefits, and Missouri's policy of attempting to collect the entire amount of AFDC benefits paid out does not restrict the availability of

(Footnote 6 continued on next page)

regulations and statute apply only to current support obligations (and resulting arrearages) based on a judicial or administrative support order and that Mo. Rev. Stat. § 454.465(2) applies to "state debt" based on the amount of unreimbursed public assistance paid in the absence of a support order. The basis for their argument is that section 454.465(2) is nothing more than the codification of the common law action for necessities,and that a fundamental difference exists between child support obligations and an action for necessities. They argue that when the Division proceeds under section 454.465(2), the State of Missouri acts as any other creditor and thus may seek to recover the total amount of benefits paid. We are unpersuaded by this distinction. Here, Missouri participates in a federal program and receives federal funds. As a condition of receiving such funds, Missouri must comply with program requirements and cannot refuse to comply with federal regulations governing the program by simply stating that the monies it seeks to recover are governed by state law.

The directors also argue that the Division has adopted a scale and formula for determining minimum support obligations and is therefore in compliance with the federal regulations. The directors point to Mo. Rev. Stat. § 454.480 (1986) and 13 C.S.R. 30-5.010 (1991), which set forth considerations similar to those in 45 C.F.R. § 350.53 for determining a parent's minimum support obligation. These enactments, however, concern the determination of a parent's minimum support obligation and do not concern the recoupment of public assistance benefits in the absence of an administrative hearing. *See* Mo. Rev. Stat. §

(Footnote 6 continued)

individuals to receive child support enforcement services. We reject this distinction. These decisions do not rest on the fact that the state regulation in issue concerns eligibility requirements. Rather, it is the conflict between the state and federal regulation which supports the courts' invalidation of the state regulation.

454.475. Moreover, the directors admit that their policy is to set the state debt at the total amount of AFDC benefits paid out.

We are convinced that the Director's policy in setting the amount of state debt as the total amount of public assistance paid out violates federal regulations governing the AFDC program. Here, statutes and regulations covering the AFDC program require that the states follow criteria set forth in 45 C.F.R. § 302.53(a). 42 U.S.C. § 654(13) (1988) provides " . . . the State *will comply* with such other requirements and standards as the Secretary [of Health and Human Services] determines to be necessary to the establishment of an effective program for . . . obtaining support orders, and collecting support payments."

The mandatory language of the regulations requires that the criteria set forth in 45 C.F.R. § 302.53(a) be considered. Section 302.50(b) explains that if there is not court order for support, the amount of the support obligation is determined "in accordance with a formula which meets the criteria prescribed in § 302.53."

Section 302.53(c) further provides:

> The formula described in paragraph (a) of this section *shall* be utilized to determine the required monthly support obligations, the amount of support obligation arrearage, if any, and the amount to be paid periodically against such arrearage.

(Emphasis added.) Mo. Rev. Stat. § 454.465(2) and the Director's policy are inconsistent with federal regulations governing the AFDC program. Accordingly, section 454.465(2) violates the supremacy clause and is invalid.

We affirm on the ground that the supremacy clause prevents the implementation of a reimbursement policy other than one in accordance with existing federal regulations. Our decision makes it unnecessary to reach the due process issue.

II.

The directors next argue that the district court erred in denying motions for partial summary judgment on plaintiffs' claim for damages.

— A —

The directors argue that they are absolutely immune from damages under the reasoning set forth in *Butz v. Economou*, 438 U.S. 478 (1978). In *Butz*, the Supreme Court held that executive officials are immune from damages liability for their judicial acts. *Id.* at 514. Here, the district court rejected the directors' defense of absolute immunity, stating:

> The action in the case at bar concerns the decisions of [the directors] . . . not to use the federally mandated formula in setting the amount of "state debt" owed by the non-custodial parent. This decision was not adjudicatory in nature, but was purely administrative.

Jackson, slip op. at 22; *Skelton*, slip op. at 20.

The district court's reasoning is consistent with that of the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Mitchell v. Forsyth*, 472 U.S. 511 (1985). In *Harlow*, the Court held that public officials are protected by absolute immunity only in certain, well-defined circumstances. 457 U.S. at 807. In *Mitchell*, the Court declined to provide absolute immunity to the Attorney General of the United States in a suit arising out of the Attorney General's authorization for conducting wiretaps. The Court declined to extend absolute immunity to the Attorney General because: (1) the Attorney General's role in carrying out tasks essential to national security had no analogous historical or common law basis for absolute immunity; (2) the Attorney General's responsibility for national security matters was not the type of function that might be significantly affected by the threat of harassing or vexatious litigation; and (3) no

alternatives to damage suits existed against the Attorney General as a means of addressing the wrongful conduct. 472 U.S. at 531-24.

The directors contend that an application of the factors set forth in *Mitchell* shows that they are entitled to absolute immunity. They argue that their role is adjudicatory, not purely administrative, and that one of the reasons for adopting legislation relating to child support enforcement in Missouri was to eliminate the burden on the courts and prosecuting attorneys. We reject the directors' reasoning. The directors' policy of setting the amount of the state debt is an administrative function, albeit the results of their decisions may ultimately end up in the court system. *Cf. Kwoun v. Southeast Missouri Prof. Stds. Review Org.*, 811 F.2d 401, 408-09 (8th Cir. 1987), *cert. denied*, 484 U.S. 1022 (1988).

The directors also argue that they are exposed to a high risk of harassing or vexatious litigation, and that they especially at risk because of the emotional nature of domestic relations cases and the large number of cases concerning child support. As the Supreme Court stated in *Mitchell*, however, the potential for a substantial number of cases does not require the extension of absolute immunity. 472 U.S. at 522 n.6. We fail to see how the directors' decision to comply with mandated federal regulations could breed harassing or vexatious litigation.

Finally, the directors argue that alternatives to damage suits exist and that they are subject to other checks that prevent an abuse of their discretion. They say that such checks include a non-custodial parent's right to seek judicial review challenging the setting of the state debt and the issuance of an administrative order. They further argue that because Rapps and Henry are attorneys, sanctions from the trial court and state bar disciplinary committees are also available if they abused their discretion.

Judicial review in an administrative hearing is available only when a "factual issue requiring the submission of evidence" exists. Mo. Rev. Stat. §§ 454.470, 454.475(1). There is no recourse available to challenge the director's underlying policies. Trial court sanctions or disciplinary committee proceedings do not provide an avenue for redress to a noncustodial parent in this situation. We cannot conclude that the district court erred in ruling that the directors are not absolutely immune from damage suits.

— B —

The directors also argue that they are entitled to qualified immunity from plaintiffs' damage claims. Qualified immunity protects a government official from suit if, at the time of the challenged acts, it was not clearly established that those actions would violate clearly established law of which a reasonable person would have known. *Harlow,* 457 U.S. at 818-19; *Arcoren v. Peters,* 829 F.2d 671, 673 (8th Cir. 1987) (en banc), *cert. denied,* 458 U.S. 987 (1988).

The directors set forth several reasons for contending that their failure to establish a formula in determining the amount of the state debt under section 454.465(2) does not constitute a clear violation of federal statute or regulations. They argue, once again, that they did not adopt a formula and, therefore, no violation of any kind occurred. They also argue that because: (1) the formula set forth in 45 C.F.R. § 302.53 allows a state to incorporate "[o]ther reasonable criteria . . .", (2) other states have established similar policies, and (3) 42 U.S.C. § 602(a)(27) requires only "substantial compliance," they did not violate clearly established law of which a reasonable person would have known.

We are unpersuaded by the directors' reasoning. The federal statute and regulations unambiguously require the directors to

utilize the prescribed formula in setting the state debt, and the directors are not entitled to qualified immunity.

III.

After briefing and oral argument in this case, we were informed that Congress had amended 45 C.F.R. § 302.50, removed section 302.53, and revised section 302.56, expanding a reference to guidelines for judicial or administrative action and setting and modifying child support award amounts. 56 Fed. Reg. 22335-22354 (1991). As this case is before us on appeal under 28 U.S.C. § 1292(b), we must remand to the district court which may further consider its injunctive order under the modified regulations.

We affirm the judgment of the district court and remand to the district court for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 89-4022-CV-C-5

GLENDA JACKSON, Individually and on behalf
of others similarly situated,
Plaintiff,

vs.

WILLIAM R. RAPPS, Individually and as Director
of the Missouri Division of Child Support Enforcement,
Defendant.

ORDER

Before this Court are the cross-motions of plaintiff Glenda Jackson and defendant William R. Rapps for summary judgment on the issue of liability, in an action against defendant William R. Rapps, individually and as Director of the Missouri Division of Child Support Enforcement. This cause of action concerns defendant's method of calculation of Ms. Jackson's "state debt" for money allegedly owed to the state as reimbursement for the state's Aid to Families of Dependent Children payments to Ms. Jackson's former spouse. Ms. Jackson alleges that the Director's actions are in violation of the United States Constitution and federal law. Ms. Jackson alleges, in the alternative, that the Director's actions are in violation of state statute. In accordance with the reasoning in this order, this Court grants plaintiff's motion for summary judgment on the issue of liability and denies defendant's motion for summary judgment.

I. Factual Background

A. Statutory Framework

The State of Missouri, though [sic] the Division of Child Support Enforcement ("DCSE"), participates in the joint state/federal Child Support Enforcement Program under Title IV-D of the Social Security Act, 42 U.S.C. § 651-665 (1988), and the Federal Regulations promulgated pursuant to the Act, 45 C.F.R. § 302.1-307.12 (1989). Under federal law, the DCSE is responsible for the administration of the program in the State of Missouri. The State is required to adopt a state plan in conformity with the Federal Regulations established for the administration of the program by the United States Department of Health and Human Services. 45 C.F.R. § 302.1-302.12 (1989).

The Federal Regulations and state statutes require that all applicants for Aid to Families with Dependant Children ("FDC") assign to the State any rights to support owed from any other person, which includes child support payments. 45 C.F.R. § 232.11(a)(1) (1989); Mo. Rev. Stat. § 208.040 (Supp. 1990). The Federal Regulations and the state statutes also provide methods for determination of the amount of any support owed. The Federal Regulations provide two alternative methods of determining the amount owed:

> (a) the support rights assigned to the IV-D agency pursuant to [45 C.F.R.] § 232.11 of this title or section 471(a)(17) of the Act constitute an obligation owed to the State by the individual responsible for providing such support. Such obligation shall be established by:
>
> (1) Order of a court of competent jurisdiction,
>
> (2) Other legal process as established by State law, such as an administrative hearing process or a legally enforceable and binding agreement;
>
> * * *

> (b) The amount of the obligation described in paragraph (a) of this section shall be:
>
> > (1) The amount specified in the order of a court of competent jurisdiction which covers the assigned support rights; or
> >
> > (2) If there is no court order, an amount determined by the IV-D agency as part of the legal process referred to in paragraph (a)(2) of this section in accordance with a formula which meets the criteria prescribed in § 302.53.

45 C.F.R. § 302.50 (1989).

Missouri's state plan for child support enforcement, as originally enacted in response to the federal mandate, provided that where no court order addressed the duty to provide support, that the State would administratively establish support arrearages to be referred to as the "state debt." The original Missouri statute did not require the use of a formula, but stated that the "state debt" would be equal to the amount of public assistance paid out. As originally enacted in 1982, § 454.465 provided:

> [P]ayment of public assistance by the division . . . creates an obligation, to be called "state debt," which is due and owing to the division . . . in an amount equal to the amount of public assistance so paid.

The Missouri statute was amended in 1984 after initiation of a suit challenging the constitutionality of the statute based on failure to use the federally mandated formula. The current Missouri statute has language similar to the federal statute, except that under the state statute the obligation, or "state debt," is not determined by a formula, but is set by the Director of the DCSE:

> (1) Where these exists a court order directed to a parent which covers that parent's support obligation to a dependant during a period in which the Division of Family Services provided public assistance to or for the benefit of that dependant, the state debt of the parent shall be an amount equal to the obligation ordered by the court including arrearages and unpaid medical expenses, up to the full amount of public assistance paid, or
>
> (2) Where no court order covers a parent's support obligation to a dependant during a period in which the Division of Family Services provided public assistance to or for the benefit of the dependent, the state debt may be set or reset by the director [of the Division of Child Support Enforcement or his designee] in an amount not to exceed the amount of public assistance so provided by the Division of Family Services.

Mo. Rev. Stat. §§ 454.465.1(2) & 454.460(4) (Supp. 1990).

B. Facts of the Case

Plaintiff Glenda Jackson is the mother of three children. Ms. Jackson was divorced from the father of her children on April 13, 1983. The father was awarded custody of the three minor children. Ms. Jackson was unemployed at that time, and neither she nor the father were ordered to pay child support.

Ms. Jackson subsequently filed a motion to modify the custody order by awarding to her the custody of the children along with child support payments. Ms. Jackson was granted leave of court to file her motion as a "poor pension" without payment of a filing fee.

The circuit court on September 9, 1983 denied Ms. Jackson's motion subject to modifications and conditions provided in the order. One of the modifications allowed Ms. Jackson weekend

visitation with the children. Another modification was a requirement mistakenly entered by the court that Ms. Jackson was to pay the father the sum of ten dollars ($10.00) a month per child for the three children while they were exercising visitation with Ms. Jackson.

The circuit court thereafter on October 4, 1983 entered a *nunc pro tunc* order stating that the September 9, 1983 order contained a "scrivener's error." The October 4, 1983 order stated that the September 9, 1983 order should have required the father to pay the mother, Ms. Jackson, the sum of ten dollars ($10.00) per month per child for the three children while they were exercising visitation with the mother, Ms. Jackson. The order did not require Ms. Jackson to pay child support.

The father began receiving AFDC payments in January of 1986. The prosecuting attorney for Dunklin County subsequently wrote to Ms. Jackson on October 31, 1988, stating the Division of Child Support Enforcement ("DCSE") had contacted him and requested that he seek a modification of Ms. Jackson's divorce decree to require her to pay child support for her three children. Ms. Jackson had remarried at this time, and was working outside the home. Counsel for Ms. Jackson states that the assistant prosecutor for Dunklin County informed him on January 9, 1989 that the DCSE would not be seeking child support from Ms. Jackson.

The Director of the Missouri Division of Child Support Enforcement, William R. Rapps, ("Director Rapps"), on January 4, 1989 issued a Notice of Finding of Financial Responsibility, asserting that Ms. Jackson was responsible for repaying the state $11,064.00 as a "state debt" under §§ 454.460 - 454.510 of the Missouri statutes. The "state debt" was reimbursement for the public assistance (i.e. AFDC and Medicaid) paid out by the State on behalf of Ms. Jackson's children.

On April 26, 1989 the Missouri Department of Revenue intercepted the joint income tax refund of Ms. Jackson and her current husband in order to satisfy the $11,064.00 "state debt" claimed by the DCSE. Plaintiff Jackson then filed the present action on January 26, 1990.

Director Rapps subsequently entered an administrative default order for $11,064.00 and ordered Ms. Jackson to maintain medical insurance on the children. The administrative order was filed in the Dunklin County Circuit Clerk's office, and has the effect of a lien on property. Mo. Rev. State. [sic] § 454.465 (1986).

Director Rapps issued to Ms. Jackson's employer on March 23, 1990 an order requiring her employer to withhold $424.40 per month up to fifty per cent (50%) of Ms. Jackson's disposable earnings. The order stated that Ms. Jackson owed a debt to the state of $13,495.00, and support of $187.00 per month for the two remaining children (one child had reached the age of eighteen in the interim, and was no longer eligible for child support).

Ms. Jackson filed her claims as a class action under 42 U.S.C. § 1983, alleging violation of the due process and supremacy clauses of the United States Constitution. The constitutional violations are alleged to be the result of state action which does not comply with applicable federal law. Ms. Jackson alternatively alleges that the actions of Director Rapps do not comply with the state statute. The complaint demands declarative and injunctive relief, compensatory damages in the amount of $100,000.00, punitive damages in the amount of $750,000.00, and reasonable attorney's fees and costs under 42 U.S.C. § 1983.

II. Analysis

A. Standard for Summary Judgment

Summary judgment can be granted only if there is no genuine dispute as to material fact and if the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The moving party has the burden of showing that there is no genuine dispute as to material fact. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553 (1986).

Once the moving party has met this burden, the non-moving party must set forth evidence of specific facts showing the existence of a genuine issue for trial. *Id.*; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 St. Ct. 2505, 2514 (1986). Evidence of a disputed factual issue which is merely colorable or not significantly probative, however, will not prevent entry of summary judgment. *Id.* at 2511.

In deciding the motion, this Court must view the material facts, and the inferences properly drawn therefrom, in the light most favorable to the non-moving party. *Anderson* at 255-56, 106 S. Ct. at 2513. Only the facts that may affect the outcome of the case under the governing law and are necessary elements of the claim are "material." *Id.* Moreover, a factual dispute is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.*

B. Circuit Court Decree as Covering Support Rights

Plaintiff Glenda Jackson asserts that the October 4, 1982 circuit court order is a court order which: (1) expressly addressed the issue of child support; (2) did not require Ms. Jackson to pay child support; and (3) specifically ordered the father to pay support when the children were visiting their mothers. The Missouri statute specifies that where there exists a court order which covers that parent's support obligation to a dependant, the

state debt of the parent shall be equal to the obligation ordered by the court. Ms. Jackson contends that the circuit court's custody decree was "an order of a court of competent jurisdiction" which covered her support obligation to her former husband. Ms. Jackson states that it was this support obligation, which was $0.00, which her former husband subsequently assigned to the State of Missouri when he applied for AFDC. Ms. Jackson concludes that as the result of the circuit court order, she had no support obligation to the father, the father had no support obligation to assign to the State as a condition of receipt of AFDC payments and, therefore, she owed nothing to the State.

This Court has examined the fact situation in the case at bar. The circuit court's October 4, 1983 custody decree was entered on Ms. Jackson's motion to modify the custody order. Ms. Jackson's motion requested that the custody order be modified by awarding to her the custody of the children and child support payments. The court was asked to address t he issue of the support obligation of Ms. Jackson's former husband to Ms. Jackson, but was not asked to address Ms. Jackson's support obligation to her former husband. It cannot be reasonably inferred that a court in such a situation would also, as a matter of course, consider support obligations for which no motion was made.

This Court's determination of the issue of the status of the October 4, 1983 order also involves statutory construction. Section 454.465.1(1) of the Missouri statutes specifies that where there is a court order covering that parent's support obligation, that the order controls the amount of the "state debt." A court order is defined in section 454.460(2) as "any judgment, decree, or order of any court which orders payment of a set or determinable amount of money." In the case at bar, the October 4, 1983 custody decree does not order Ms. Jackson to pay a set amount of money. The order does not address her support obligations in any manner. Therefore, the custody decree does not cover Ms. Jackson's support obligation.

Courts in other jurisdictions have ruled on similar issues of law involving the State Child Support Enforcement Division's attempt to collect money from non-custodial parents whose children received public assistance. One case decided by the Supreme Court of Alaska involved five consolidated cases where the prior court orders did not include provisions requiring the non-custodial parents to pay child support. *State v. Gammons*, 774 P.2d 181 (Alaska 1989). The court concluded that those orders were not "support orders" within the meaning of the AFDC statutes, and that the non-custodial parent must repay the AFDC to the state in the amount determined by the state. *Id.* at 183-84. *See also State Dept. of Revenue v. Hubbard*, 720 P.2d 1177, 222 Mont. 156 (1986). The court in *State v. Gammons* based its conclusion on statutory construction.

This Court has reviewed the Ms. Jackson's fact situation in the case at bar, the Missouri state statutes, and other relevant case law. This Court has determined that as a matter of law, the October 4, 1983 custody decree is not a court order covering Ms. Jackson's support obligations to her former husband.

C. Violation of Supremacy Clause

Ms. Jackson claims, in the alternative, that the Director's failure to set her "state debt" in accordance with the formula mandated by the Federal Regulations was in violation of the Supremacy Clause of the United States Constitution. It is well-established that the Supremacy Clause, U. S. Const., Art. VI, cl.2, invalidates state laws which "interfere with, or are contrary to," federal laws. *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824).

Plaintiff Glenda Jackson asserts that defendant Director Rapps and the DCSE have violated the Supremacy Clause by failing to establish proper standards for assessing the "state debt" as required by 45 C.F.R. § 302.50 and § 302.53. Sections 302.50 and 302.53 of the Federal Regulations establish a method for

determining the amount of support obligation. That method provides that in the event that there is no court order establishing the amount, the enforcement agency must determine the amount of support obligation in accordance with a formula:

> [The] amount [is] determined in writing by the [enforcement] agency as part of the legal process referred to in paragraph (a)(2) of this section in accordance with a formula which meets the criteria prescribed in § 302.53.

45 C.F.R. § 302.50(b)(2) (1989). The formula, as established in § 302.53, must take into consideration the following factors:

> (1) All earnings income and resources of the absent parent including real and personal property;
>
> (2) The earnings potential of the absent parent;
>
> (3) The reasonable necessities of the absent parent;
>
> (4) The ability of the absent parent to borrow;
>
> (5) The needs of the child from whom the support is sought;
>
> (6) The amount of assistance which would be paid to the child under the full standard of need of the State's IV-A plan;
>
> (7) The existence of other dependants; and
>
> (8) Other reasonable criteria which the State may choose to incorporate.

45 C.F.R. § 302.53 (1989).

The Missouri statute, rather than utilizing the formula in the Federal Regulations, authorizes the Director of the DCSE to "set or reset" the amount of state debt "in an amount not to exceed the amount of public assistance paid." Mo. Rev. Stat. § 454.465

(1986). Ms. Jackson's supporting documentation indicates that it has been the policy of the DCSE to set the amount of "state debt" at the total amount of public assistance paid. *See, e.g.*, Hearing Transcript at 33-40, *Shipman v. Missouri Division of Family Services*, Case No. S83-199C (U.S. District Court E.D. Mo., E. Div., March 28-29, 1988). In the case at bar, Director Rapps set the amount of "state debt" at the total amount of public assistance paid to Ms. Jackson's former husband.

This state policy on calculation of the "state debt" is, on its face, in direct contravention to the requirements of the Federal Regulations. The United States Supreme Court has stated that Federal Regulations have the same preemptive force as acts of Congress. *Hillsborough County v. Automated Medical Labs, Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 2375 (1985). Therefore, sections 302.50 and 302.53 of the Federal Regulations requiring that the support obligation be set in accordance with a formula can have preemptive force.

The case at bar involves a matter of domestic relations law, which is generally left to the states to regulate. The Supreme Court has consistently recognized that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-94, 10 S. Ct. 850, 852-53 (1890). There is a higher standard for the establishment of federal preemption in the area of domestic relations. This Court's view of Supremacy Clause challenges to domestic relations laws is limited to a determination of whether Congress has "positively required by direct enactment that state law be pre-empted." *Rose v. Rose*, 481 U.S. 619, 625, 107 S. Ct. 2029, 2033 (1987) (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S. Ct. 802, 808 (1979)). The state law "must do 'major damage' to 'clear and substantial' federal interests" in order for the preemption doctrine to apply. *Id.* (citations omitted).

Defendant argues that plaintiff has not met the higher burden in the base at bar. Defendant supports his argument by citing the Supreme Court's holding in *Rose v. Rose*, contending that the *Rose* Court determined that federal child support enforcement did not preempt state laws in the area of domestic relations. This is not a true statement of the *Rose v. Rose* holding. The *Rose* Court held only that the state statute in question did not conflict with the federal law, and that therefore preemption did not occur. *Id.* at 634-35, 107 S. Ct. at 2038-39. Therefore, *Rose v. Rose* is not determinative of the ability of the plaintiff in the case at bar to meet that higher standard for preemption of a domestic relations law.

The Supreme Court has not ruled on the preemptive force of the federal child support enforcement provisions. The Court has ruled, however, on the preemptive force of similar federal statutes, such as the federal AFDC provisions, over state domestic relations laws. In *Townsend v. Swank*, 404 U.S. 282, 92 S. Ct. 502 (1971), a state law defining dependant children eligible for AFDC benefits was challenged on the basis that it conflicted with the definition in the Federal Regulations. The Supreme Court concluded that state requirements not in compliance with federal AFDC standards violated the Supremacy Clause, and were thus invalid. *Id.* at 285-86, 92 S. Ct. at 505.

Another case wherein the Court ruled on the preemptive force of federal laws over state domestic relations laws in *Planned Parenthood Association of Utah v. Dandoy*, 635 F.2d Supp. 184 (D. Utah 1986). In *Planned Parenthood*, the Court ruled on the preemptive force of the federal Medicaid grant program over a state law prohibiting the use of public funds to provide contraceptive services to unmarried minors without parental consent. The Court held that the federal law preempted the state domestic relations law, even though the state's participation in the program was voluntary. *Id.* at 188-89. The *Planned Parenthood* court reasoned that once the state entered the federal program,

conflicting state legislation was preempted. The court concluded:

> Notwithstanding the limited application of federal law in the field of domestic relations generally, this Court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights.

Id. at 188 (citing *Ridgway v. Ridgway*, 454 U.S. 46, 54, 102 S. Ct. 49, 54 (1981)).

Defendants seem to argue that because the case at bar involves state domestic relations law that a federal regulation cannot override the state statute absent total preemption of the field of child support enforcement. However, the United States Supreme Court has stated that preemption of a state law by a federal law occurs in situations other than total preemption of a field. Preemption under the Supremacy Clause occurs under the following circumstances:

> [F]irst, when Congress in enacting a federal statute, has expressed a clear intent to preempt state law; second, when it is clear, despite the absence of explicit preemptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has thereby 'left no room for the States to supplement' federal law; and finally when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purpose and objective of Congress.'

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699, 104 S. Ct. 1694, 1700 (1984) (citations omitted). Thus, federal regulations which "do not exclude all state legislation in [the] same field

nevertheless override state laws with which they conflict." *Jones v. Rath Packing co.*, 430 U.S. 519, 525-26, 97 S. Ct. 1305, 1310 (1977).

It is this Court's determination that the Federal Regulations in the case at bar have preemptive force under the third set of circumstances in *Capital Cities*: when a state law stands as an obstacle to accomplishment of the objectives of Congress. In order to apply the third *Capital Cities* test to the case at bar, this Court must first determine the objectives of Congress when it mandated the establishment of a joint state/federal child support enforcement program, 42 U.S.C. 651-665. The federal statutes require as a condition for federal funding that the state child support enforcement program comply with the requirements set forth in the Federal Regulations. 42 U.S.C. §§ 601, 652, & 654 (1989). Clearly, it was the objective of Congress to establish a uniform and effective method of child support enforcement in compliance with minimum standards to be set by the U. S. Department of Health and Human Services and codified in the Code of Federal Regulations.

This Court will next examine, under the *Capital Cities* test, that portion of the state's enforcement program at issue to determine if it frustrates Congressional objectives. The state's adopted method of setting the amount of the non-custodial parent's obligation allows the Director, in the absence of a court order setting the amount, to set the amount at his discretion, not to exceed the public assistance paid to the non-custodial parent. It has been the Director's policy to set the amount of "state debt" in an amount equivalent to the total amount of public assistance paid out by the state. The state does not consider the financial situation of the non-custodial parent, nor does it in any way consider the facts of each individual child support enforcement case, as is required in the federally mandated formula. It is clear that Missouri's refusal to use the federal formula stands as an obstacle to the accomplishment of the full purpose and objec-

tives of the Congressional mandate that federally funded state enforcement programs comply with federal standards. This Court, therefore, concludes, under the *Capital Cities* test, that the Federal Regulations requiring the amount of support obligation to be set in accordance with a formula have preemptive force over the Missouri statute and the Director's enforcement policy.

The State's method of calculation does not comply with the Federal Regulations. It is the Director's policy, rather than the state statute itself, which is in direct conflict with the Federal Regulations. The fact that it is the state policy rather than the actual state statute which is in direct conflict does not affect the preemptive impact of the Federal Regulations. Established policies concerning the application of the state statutes which conflict with federal mandates can also be preempted by Federal Regulations. The United States Supreme Court has stated:

> The criterion for determining whether state laws are so inconsistent that state law much give way is firmly established in our decision. Our task is 'to determine whether, under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress.' This requirement requires us to consider the relationship between the state and federal laws as they are interpreted and applied, not merely as they are written.

Jones v. Rath Packing co., 430 U.S. 519, 526, 97 S. Ct. 1305, 1310 (1977) (citations omitted).

The critical issue in a preemption analysis is whether Congress intended that federal regulation supersede state law. *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 106 S. Ct. 1090 (1907). This Court will examine the federal child support enforcement provisions in order to determine if Congress intended preemption. The Federal Regulations provide a comprehensive scheme for the recovery from the non-custodial

parent of funds expended by the State and the federal governments. Federal statutes require as a condition for federal funding that the State child support enforcement program comply with the requirements in the Federal Regulations promulgated by the U. S. Department of Health and Human Services. 42 U.S.C. §§ 601, 652 & 654 (1989). The Federal Regulations specifically mandate that in those instances where there is no court order, the state shall set the amount recoverable "in accordance with a formula which meets the criteria prescribed in § 302.53." 45 C.F.R. § 302.50(b)(2) (1989). That formula requires consideration of factors such as the non-custodial parent's financial situation and the needs of the child for whom public assistance has been supplied.

The unambiguously-stated federal provisions clearly set out the intent of Congress when it enacted the child support enforcement provisions, as has been previously discussed in this order. The regulatory scheme enacted by Congress specifies that federal agencies oversee the state child support enforcement programs. 42 U.S.C. § 652 (1983 & Supp. 1990). State enforcement programs must comply with the specific requirements of the Federal Regulations, as a condition for receipt of federal funds. It is clear that it was not the intent of Congress that the state should establish its own methods and procedures, while still receiving federal funding, as Missouri has done. It is clear that Congress intended to preempt the field of child support enforcement in those states like Missouri which have elected to participate and receive federal funds.

The United States Supreme Court, when ruling on a Supremacy Clause challenge to a state AFDC law which conflicted with the Federal Regulations, did not even question the preemptive force of the federal AFDC laws. *Townsend v. Swank*, 404 U.S. 282, 285-86, 92 S. Ct. 502, 505 (1971). Nor shall this Court further question the preemptive force of the federal child support enforcement laws. It is clear to this Court that Congressional

enactment of the federal child support enforcement provisions has positively required that state law be pre-empted in accordance with *Rose v. Rose* standard for preemption of state domestic relations law. 481 U.S. 619, 625, 107 S. Ct. 2029, 2033 (1987) (citations omitted). Further, in accordance with the *Rose v. Rose* standard, this Court finds that the Director's policy of setting the "state debt" in an amount equal to the public assistance paid out does "major damage to clear and substantial federal interests." *Id.* (citations omitted). The Director's policy is preempted by the Federal Regulations requiring the use of a formula. As such, the State's policy and practice is invalid and unconstitutional.

D. Eleventh Amendment Immunity

Defendant correctly states, and plaintiff agrees, that the Eleventh Amendment bars recovery of money damages from the state, or from a state official acting in his official capacity. *Edelman v. Jordan*, 415 U.S. 651, 662-68, 94 S. Ct. 1347, 1355-58 (1974). Defendant can, however, be sued in his official capacity for injunctive relief. *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908).

E. Absolute Immunity

Defendant Rapps contends that he is entitled to absolute immunity from damages in a civil action for deprivation of plaintiff's constitutional rights. Defendant asserts that his actions as a State official are analogous to those of a prosecutor in a criminal proceeding and, therefore, judgment against him in his individual capacity is barred by absolute immunity.

Defendant Rapps cites *Butz v. Economou* , 438 U.S. 478, 98 S. Ct. 2894 (1978) in support of his proposition. The court in *Butz v. Economou* extended the absolute prosecutorial immunity to those involved in an administrative proceeding before the United States Department of Agriculture. The Department had

initiated an administrative hearing to revoke or suspend the registration of a commodity futures merchant. The *Butz v. Economou* court deemed absolute immunity necessary to permit officials to exercise their discretion free of intimidation or harassment by litigants. The court stated:

> We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune to damages.

Id. at 512-13, 98 S. Ct. at 2914.

However, the reasoning of *Butz v. Economou* does not apply to the case at bar. The action in the case at bar concerns the decisions of Director Rapps not to use the federally mandated formula in setting the amount of "state debt" owed by the non-custodial parent. This decision was not adjudicatory in nature, but was purely administrative. Therefore, Defendant Rapps is not entitled to absolute immunity in the case at bar.

F. Qualified Immunity

Defendant contends, in the alternative, that he is entitled to qualified immunity for damages and for the entire suit, under *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982). The *Harlow* court held that the doctrine of qualified immunity bars suit not only as to liability, but as to being subjected to a trial proceeding. The qualified immunity bar applies when the alleged conduct does not violate, under an objective standard of review, a clearly established statutory or constitutional right. The inquiry concerns whether a right is clearly established as a matter of law. Whether that right is clearly established, in reference to an official's discretionary functions, must be determined by the Court by reference to decisional law as it existed at the time the defendant are alleged to have violated plaintiff's rights. *Id.*

The issue for this Court is whether Ms. Jackson's right to have her child support arrearages calculated in accordance with the federally mandated formula was a clearly established statutory right. Defendant cites *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806 (1985) for the proposition that the law concerning child support enforcement was not "established" for the purpose of qualified immunity, because the Supreme Court had not ruled on the preemptive force of the federal child support enforcement laws.

However, the fact situation in *Mitchell v. Forsyth* is clearly distinguishable from the that of the case at bar. The *Mitchell* case involved the qualified immunity of United States General John Mitchell, who had authorized a warrantless wiretap. The Court held that Mitchell was entitled to qualified immunity because it was not clearly established at the time that such wiretaps were unconstitutional. *Id.* at 2818. The Court's decision was based on the fact that such warrantless wiretaps for the protection of national security historically had been authorized since World War II, by Presidents Roosevelt, Truman, Eisenhower, Kennedy, Johnson, and Nixon. *Id.* The Court's decision was also based on the fact that the Supreme Court had not specifically ruled that warrantless wiretaps were unconstitutional. *Id.* The *Mitchell* Court concluded on these facts, that it was "anything but clear that these practices violated the Constitution. . . ." *Id.*

Unlike the facts situation in *Mitchell*, in the case at bar the federal statutes and regulations clearly require calculation of the "state debt" based on a formula. The only history of ignoring that formula and automatically setting the "state debt" at an amount equivalent to the amount of public assistance paid out was the original version of the state statute. The statute was amended to delete that very provision. The amendment occurred after initiation of a suit challenging that provision for noncompliance with the federal statute mandating the use of a formula. Therefore, *Mitchell v. Forsyth* does not control Ms. Jackson's case.

The fact that the Supreme Court has not ruled on the preemptive force of the federal child support enforcement regulations is not determinative in the case at bar.

This Court must consider another factor when determining whether Ms. Jackson's right to have her child support arrearages calculated in accordance with the federally mandated formula was a clearly established statutory right for the purpose of qualified immunity. One factor is the language of the federal law itself. The requirements of 45 C.F.R. § 302.53 are not unclear or ambiguous on their face. The Federal Regulations clearly require the use of a formula when calculating the amount of support obligation, including arrearages.

Defendant admits that the Director of DCSE is responsible for administering the program of joint state/federal child support enforcement in Missouri. Defendant further admits that as Director he was responsible for the overall administration of DCSE, which included the agency's compliance, with state and federal laws which pertain to such enforcement. The state plan requirements for the program are stated in 45 C.F.R. §§ 302.0-302.85. As a reasonably competent Director, the defendant should have known the federal law governing the joint state/federal child support enforcement program.

Defendant Rapps has not asserted that he was unaware of the federal requirements stating that a formula must be used in determining the child support arrearages owed by the non-custodial parent. Indeed, plaintiff's counsel states that he has filed three Supremacy Clause challenges to the procedure for calculation of the "state debt" against Director Rapps and his predecessor Director Michael Henry. The first of these actions was filed in 1983, *Shipman v. Missouri Department of Family Services*, 588 F. Supp. 1203 (E.D. 1984), *vacated and remanded*, 782 F.2d 1048 (8th Cir. 1985).

The 1983 suit was based on the original Missouri statute which required that the Director set the amount of "state debt" in an amount equivalent to the public assistance paid out. After initiation of the *Shipman* case, the Missouri legislature amended the statute in 1984. The amended statute allowed the "state debt" to be set at the discretion of the Director. After the amendment in 1984, the district court dismissed *Shipman* for mootness and lack of standing. The Eighth Circuit affirmed the dismissal. *Shipman v. Missouri Department of Family Services*, 877 F.2d 678 (8th Cir. 1989).

A reasonably competent director of a state department should be aware of federal laws governing the actions of his department. Further, the prior litigation challenging the same DCSE procedure being challenged in the case at bar imputes knowledge to Director Rapps that the DCSE policy was not in compliance with the Federal Regulations. Therefore, this Court holds that there is no apparent basis for defendant's assertion that he is entitled to qualified immunity.

This Court notes parenthetically that the state law prior to 1984 mandated that the Director set the amount of "state debt" at an amount equal to the public assistance paid out by the State. Any actions which might have been taken by Director Rapps pursuant to the pre-1984 statute were taken pursuant to statutory mandate. Therefore, the Director is entitled to qualified immunity for any actions which might have been taken pursuant to the pre-1984 statute.

G. Doctrine of Respondeat Superior

Defendant states that he had no direct or personal knowledge of the assessment and enforcement of the "state debt" against plaintiff Jackson, but that DCSE employees assessed and enforced the "state debt" against Ms. Jackson. Defendant argues that, therefore, he is not liable because the doctrine of *respondeat*

superior does not apply to lawsuits under 42 U.S.C. § 1983. *Glick v. Sargent*, 696 F.2d 413, 414 (8th Cir. 1983).

The doctrine of *Respondeat superior*, however, is not at issue in the case at bar. The action for which plaintiff Jackson seeks to hold Defendant Rapps liable is his refusal to adopt the federally mandated formula for calculation of child support arrearages owed as "state debt." Defendant admits that as Director of the DCSE that he was responsible for adopting policies and regulations necessary or desirable to carry out the provisions of the child support enforcement program. Mo. Rev. Stat. § 454.400(2)(6) (Supp. 1990). Liability in the case at bar is not based on the acts of the employees of Defendants Rapps, but is based on the decision made by the Director not to use a formula for the calculation of the "state debt." The doctrine of *respondeat superior* is not at issue in the case at bar.

H. Due Process

Plaintiff's complaint also makes a due process claim for violation of the Fourteenth Amendment of the United States Constitution. This Court has determined that the Director's policy of setting the "state debt" in an amount equal to the public assistance paid out violates the Supremacy Clause. Therefore, because this case has been determined on other grounds, this Court will not rule on the validity of the due process claim at this time.

III. CONCLUSION

This action challenges the State's method for calculating child support arrearages owed to the State by the non-custodial parent as reimbursement for public assistance paid out to the custodial parent. The federal mandate that child support arrearages be calculated in accordance with a formula clearly preempts Director Rapps' policy to set the amount of arrearages in an amount

equal to the amount of public assistance paid out. As such, the policy is in violation of the Supremacy Clause of the United States Constitution. This Court must grant summary judgment in favor of plaintiff Glenda Jackson on the issue of liability for violation of the Supremacy Clause.

This Court also finds that defendant is not entitled to either absolute or qualified immunity. This Court notes that rejection of a claim for qualified immunity is immediately appealable. *Mitchell v. Forsyth,* 472 U.S. 511, 105 S. Ct. 2806 (1985).

It may also be found by the Appeals Court that this Court's rulings on the parties' motions for summary judgment are sufficiently related to the immunity question as to be immediately appealable. *See Moreno v. Small Business Administration,* 877 F.2d 715, 716 (8th Cir. 1989). Given the dearth of case law in this area, however, this Court additionally finds that there is substantial grounds for differing opinions on the issues before this Court and that an immediate appeal from this order will significantly advance the ultimate termination of litigation on these matters. This Court will, therefore, certify its orders concerning summary judgment for immediate appeal pursuant to 28 U.S.C. § 1292(b).

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is denied. It is further

ORDERED that plaintiff's motion for summary judgment on the issue of liability is granted. It is further

ORDERED that all administrative judgments setting the "state debt" entered by the Department of Child Support Enforcement, its Director, or predecessor agencies, prior to compliance with 45 C.F.R. § 302.53, are null and void. It is further

ORDERED that the current Director of the Missouri Department of Child Support Enforcement, shall promulgate a method to be used for the calculation of the "state debt" which shall be in compliance with the Federal Regulations, 45 C.F.R. § 302.53, as stated in this order. It is further

ORDERED that the Director of the Missouri Department of Child Support Enforcement is enjoined in the future from arbitrarily setting the amount of "state debt" in an amount equal to the amount of public assistance paid out, without taking into account the factors in the federally mandated formula, as stated in this order. It is further

ORDERED that plaintiff's counsel shall be awarded attorney's fees and costs under 42 U.S.C. § 1988, in an amount to be determined after a disposition on monetary damages. It is further

ORDERED that the issues decided in this order which are not otherwise entitled to immediate appeal are certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). It is further

ORDERED that by agreement and stipulation of the parties, the Director of the Missouri Department of Child Support Enforcement will refrain from filing any new actions for collection of administratively determined "state debt" until resolution of this matter on appeal. It is further

ORDERED that by agreement and stipulation of the parties, the Director of the Missouri Department of Child Support Enforcement will locate and stay all current actions for collection of administratively determined "state debt" on or before December 31, 1990, and such stays will remain in effect until resolution of this matter on appeal. It is further

ORDERED pursuant to 28 U.S.C. § 1292(b) that further action on this case is stayed pending disposition of defendants' stated plan to appeal this action.

/s/ SCOTT O. WRIGHT
United States District Judge

August 13, 1990

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 88-4232-CV-C-5

TERRY SKELTON, et al.,
Plaintiffs,

vs.

WILLIAM R. RAPPS, et al.,
Defendants

ORDER

Filed: Aug. 22, 1990

Before this Court are the cross-motions for summary judgment of plaintiff Terry Skelton and defendants William R. Rapps and Michael R. Henry. The cause of action was brought against defendants Rapps, individually and as Director of the Missouri Division of Child Support Enforcement, and against defendant Henry, former Director of the Missouri Division of Child Support Enforcement. The action concerns defendant's judgment against Mr. Skelton for money allegedly owed to the State as reimbursement for the State's Aid to Families of Dependent Children payments to Mr. Skelton's spouse. Mr. Skelton alleges that the Director's actions are in violation of the United States Constitution. Mr. Skelton further alleges that the actions of the Director, made pursuant to state statute, are in violation of federal law. In accordance with the reasoning in this order, this Court grants plaintiff's motion for summary judgment on the issue of liability and denies defendants' motion for summary judgment.

I. Factual Background

A. Statutory Framework

The State of Missouri, through the Division of Child Support Enforcement ("DCSE"), participates in the joint state/federal Child Support Enforcement Program under Title IV-D of the Social Security Act, 42 U.S.C. § 651-665 (1988), and the Federal Regulations promulgated pursuant to the Act, 45 C.F.R. § 302.1-307.12 (1989). Under federal law, the DCSE is responsible for the administration of the program in the State of Missouri. The State is required to adopt a state plan in conformity with the Federal Regulations established for the administration of the program by the United States Department of Health and Human Services. 45 C.F.R. § 301.1-302.12 (1989).

The Federal Regulations and state statutes require that all applicants for Aid to Families with Dependent Children ("AFDC") assign to the state any rights to support owed from any other person, which includes child support payments. 45 C.F.R. § 232.11(a)(1) (1989); Mo. Rev. Stat. § 208.040 (Supp. 1990). The Federal Regulations and the state statutes also provide methods for determination of the amount of any support owed. The Federal Regulations provide two alternative methods:

> (a) the support rights assigned to the IV-D agency pursuant to [45 C.F.R.] § 232.11 of this title or section 471(a)(17) of the Act constitute an obligation owed to the State by the individual responsible for providing such support. Such obligation shall be established by:
>
> > (1) Order of a court of competent jurisdiction,
> >
> > (2) Other legal process as established by State law, such as an administrative hearing process or a legally enforceable and binding agreement;
> >
> > * * *

(b) The amount of the obligation described in paragraph (a) of this section shall be:

(1) The amount specified in the order of a court of competent jurisdiction which covers the assigned support rights; or

(2) If there is no court order, an amount determined by the IV-D agency as part of the legal process referred to in paragraph (a)(2) of this section in accordance with a formula which meets the criteria prescribed in § 302.53.

45 C.F.R. § 302.50 (1989).

Missouri's state plan for child support enforcement, as originally enacted in response to federal mandate, provided that where no court order addressed the duty to provide support, that the State would administratively establish support arrearages to be referred to as the "state debt." The original Missouri statute did not require the use of a formula, but stated that "state debt" would be equal to the amount of public assistance paid out. As originally enacted in 1982, § 454.465 provided:

> [P]ayment of public assistance by the division . . . creates an obligation, to the called "state debt," which is due and owing to the division . . . in an amount equal to the amount of public assistance so paid.

The Missouri statute was amended in 1984 after initiation of a suit challenging the constitutionality of the statute based on failure to use the federally mandated formula. The current Missouri statute has language similar to the federal statute, except that under the state statute the obligation, or "state debt," is not determined by a formula, but is set by the Director of the DCSE:

(1) Where there exists a court order directed to a parent which covers that parent's support obligation to a depen-

> dent during a period in which the Division of Family Services provided public assistance to or for the benefit of that dependent, the state debt of the parent shall be an amount equal to the obligation ordered by the court including arrearages and unpaid medical expenses, up to the full amount of public assistance paid, or
>
> (2) Where no court order covers a parent's support obligation to a dependent during a period in which the Division of Family Services provided public assistance to or for the benefit of the dependent, the state debt may be set or reset by the director [of the Division of Child Support Enforcement or his designee] in an amount not to exceed the amount of public assistance so provided by the Division of Family Services.

Mo. Rev. Stat. §§ 454.465.1(2) & 454.460(4) (Supp. 1990).

Plaintiff Terry Skelton resides in Dunklin County, Missouri, with his wife, Sandra Skelton, and two minor children. Defendant William R. Rapps was the Director of Missouri's DCSE in the late 1980's, and is now serving as Director of the Division of Legal Services of the Department of Social Services of the State of Missouri. Defendant Michael R. Henry was the DCSE Director prior to defendant Rapps and subsequent to defendant Rapps. Defendant Henry is the current Director.

Plaintiff Skelton was separated from his wife during two periods of time, from October 1, 1982 through December 31, 1983, and from June 1, 1986 through February 28, 1987. Plaintiff's wife qualified for and received AFDC during these two periods of time. The DCSE sent notices and findings of financial responsibility for those two periods, dated January 9, 1984 and March 12, 1987. The amount of "state debt" was set at the amount of public assistance paid out.

The DCSE in an administrative default order dated September 3, 1987 set the amount of "state debt" at $4,072.00, and the

amount of current child support obligation at $545.00 per month. The DCSE sent an order to plaintiff's employer on October 30, 1987, directing it to withhold and pay over money to satisfy current support obligations and repay the "state debt." The "state debt" was adjusted to reflect the total arrearage. The DCSE also intercepted plaintiff's Skelton's income tax refunds for 1986, 1987, and 1988.

Plaintiff Skelton filed this action in June of 1988. Mr. Skelton filed his claims under 42 U.S.C. § 1983, alleging violation of the Due Process and Supremacy Clauses of the United States Constitution. The constitutional violations are alleged to be the result of state action which does not comply with applicable federal law. The complaint demands declarative and injunctive relief, compensatory damages in the amount of $100,000.00, punitive damages in the amount of $100,000.00 and reasonable attorney's fees and costs under 42 U.S.C. § 1988.

Plaintiff Skelton will be a member of class action filed in a parallel case before this Court, *Jackson v. Rapps,* Case No. 89-4022-CV-C-5. Therefore, the class action requested in Mr. Skelton's complaint need not be addressed at this time.

II. Analysis

A. Standard for Summary Judgment

Summary judgment can be granted only if there is no genuine dispute as to material fact and if the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The moving party has the burden of showing that there is no genuine dispute as to material fact. *Celotex Corporation v. Catrett,* 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2553 (1986).

Once the moving party has met this burden, the non-moving party must set forth evidence of specific facts showing the existence of a genuine issue for trial. *Id.; Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256-57, 106 S.Ct. 2505, 2514 (1986).

Evidence of a disputed factual issue which is merely colorable or not significantly probative, however, will not prevent entry of summary judgment. *Id.* at 2511.

In deciding the motion, this Court must view the material facts, and the inferences properly drawn therefrom, in the light most favorable to the non-moving party. *Anderson* at 255-56, 106 S.Ct. at 2513. Only the facts that may affect the outcome of the case under the governing law and are necessary elements of the claim are "material." *Id.* Moreover, a factual dispute is "genuine" only is the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.*

B. Supremacy Clause Claim

Plaintiff Terry Skelton claims that the Directors' failure to set his "state debt" in accordance with the formula mandated by the Federal Regulations was in violation of the Supremacy Clause of the United States Constitution. It is well-established that the Supremacy Clause, U.S. Const., Art. VI, cl.2, invalidates state laws which "interfere with, or are contrary to," federal laws. *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824).

Plaintiff Terry Skelton asserts that defendant Directors and the DCSE have violated the Supremacy Clause by failing to establish proper standards for assessing the "state debt" as required by 45 C.F.R. § 302.50 and § 302.53. Section 302.50 and 302.53 of the Federal Regulations establish a method for determining the amount of support obligation. That method provides that in the event that there is no court order establishing the amount, the enforcement agency must determine the amount of support obligation in accordance with a formula:

> [The] amount [is] determined in writing by the [enforcement] agency as part of the legal process referred to in paragraph (a)(2) of this section in accordance with a formula which meets the criteria prescribed in § 302.53.

45 C.F.R. § 302.50(b)(2) (1989). The formula, as established in § 302.53, must take into consideration the following factors:

> (1) All earnings income and resources of the absent parent including real and personal property;
>
> (2) The earnings potential of the absent parent;
>
> (3) The reasonable necessities of the absent parent;
>
> (4) The ability of the absent parent to borrow;
>
> (5) The needs of the child for whom the support is sought;
>
> (6) The amount of assistance which would be paid to the child under the full standard of need of the State's IV-A plan;
>
> (7) The existence of other dependents; and
>
> (8) Other reasonable criteria which the State may choose to incorporate.

45 C.F.R. § 302.53 (1989).

The Missouri statute, rather than utilizing the formula in the Federal Regulations, authorizes the Director of the DCSE to "set or reset" the amount of state debt "in an amount not to exceed the amount of public assistance paid." Mo. Rev. Stat. § 454.465 (1986). Mr. Skelton's supporting documentation indicates that it has been the policy of the DCSE to set the amount of "state debt" at the total amount of public assistance paid. *See, e.g.*, Hearing Transcript at 33-40, *Shipman v. Missouri Division of Family Services,* Case No. S83-199C (U.S. District Court E.D. Mo., E. Div., March 28-29, 1988). In the case at bar, the Director set the amount of "state debt" at $8,532.00, the total amount of public assistance paid to Mr. Skelton's wife.

This state policy on calculation of the "state debt" is, on its fact, in direct contravention of the requirements of the Federal

Regulations. The United States Supreme Court has stated that Federal Regulations have the same preemptive force as acts of Congress. *Hillsborough County v. Automated Medical Labs, Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375 (1985). Therefore, sections 302.50 and 302.53 of the Federal Regulations requiring that the support obligation be set in accordance with a formula can have preemptive force.

The case at bar involves a matter of domestic relations law, which is generally left to the states to regulate. The Supreme Court has consistently recognized that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-94, 10 S.Ct. 850, 852-53 (1890). There is a higher standard for the establishment of federal preemption in the area of domestic relations. This Court's review of Supremacy Clause challenges to domestic relations laws is limited to a determination of whether Congress has "positively required by direct enactment that state law be pre-empted." *Rose v. Rose*, 481 U.S. 619, 625, 107 S.Ct. 2029, 2033 (1987) (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S.Ct. 802, 808 (1979)). The state law "must do 'major damage' to 'clear and substantial' federal interests" in order for the preemption doctrine to apply. *Id.* (citations omitted).

Defendants argue that plaintiffs have not met that higher burden in the case at bar. Defendants support their argument by citing the Supreme Court's holding in *Rose v. Rose*, contending that the *Rose* Court determined that federal child support enforcement did not preempt state laws in the area of domestic relations. This is not a true statement of the *Rose v. Rose* holding. The *Rose* Court held only that the state statute in question did not conflict with the federal law, and that, therefore, preemption did not occur. *Id.* at 634-35, 107 S.Ct. at 2038-39. Therefore, *Rose v. Rose* is not determinative of the ability of the plaintiff in the case at bar to meet that higher standard for preemption of a domestic relations law.

The Supreme Court has not ruled on the preemptive force of the federal child support enforcement provisions. The Court has ruled, however, on the preemptive force of similar federal statutes, such as the federal AFDC provisions, over state domestic relations laws. In *Townsend v. Swank*, 404 U.S. 282, 92 S.Ct. 502 (1971), a state law defining dependent children eligible for AFDC benefits was challenged on the basis that it conflicted with the definition in the Federal Regulations. The Supreme Court concluded that state requirements not in compliance with federal AFDC standards violated the Supremacy Clause, and were thus invalid. *Id.* at 285-86, 92 S.Ct. at 505.

Another case wherein the court ruled on the preemptive of federal laws over state domestic relations laws is *Planned Parenthood Association of Utah v. Dandoy*, 635 F. Supp. 184 (D. Utah 1986). In *Planned Parenthood*, the court ruled on the preemptive force of the federal Medicaid grant program over a state law prohibiting the use of public funds to provide contraceptive services to unmarried minors without parental consent. The court held that the federal law preempted the state domestic relations law, even though the state's participation in the program was voluntary. *Id.* at 188-89. The *Planned Parenthood* court reasoned that once the state entered the federal program, conflicting state legislation was preempted. The court concluded:

> Notwithstanding the limited application of federal law in the field of domestic relations generally, this Court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights.

Id. at 188 (citing *Ridgway v. Ridgway*, 454 U.S. 46, 54, 102 S.Ct. 49, 54 (1981)).

Defendants seem to argue that because the case at bar involves state domestic relations law that a federal regulation cannot override the state statute absent total preemption of the field of child support enforcement. However, the United States Supreme Court has stated that preemption of a state law by a federal law occurs in situations other than total preemption of a field. Preemption under the Supremacy Clause occurs under the following circumstances:

> [F]irst, when Congress in enacting a federal statute, has expressed a clear intent to preempt state law; second, when it is clear, despite the absence of explicit preemptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has thereby 'left no room for the States to supplement' federal law; and finally when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purpose and objective of Congress.'

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699, 104 S.Ct. 2694, 2700 (1984) (citations omitted). Thus, federal regulations which "do not exclude all state legislation in [the] same field nevertheless override state laws with which they conflict." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26, 97 S.Ct. 1305, 1310 (1977).

It is this Court's determination that the Federal Regulations in the case at bar have preemptive force under the third set of circumstances in *Capital Cities:* when a state law stands as an obstacle to accomplishment of the objectives of Congress. In order to apply the third *Capital Cities* test to the case at bar, this Court must determine the objectives of Congress when it mandated the establishment of a joint state/federal child support enforcement program, 42 U.S.C. §§ 652-665. The federal statutes require as a condition for federal funding that the state

child support enforcement program comply with the requirements set forth in the Federal Regulations. 42 U.S.C. §§ 601, 652, & 654 (1989). Clearly, it was the objective of Congress to establish a uniform and effective method of child support enforcement in compliance with minimum standards to be set by the U.S. Department of Health and Human Services and codified in the Code of Federal Regulations.

This Court will next examine, under the *Capital Cities* test, that portion of the State's enforcement program at issue to determine if it frustrates Congressional objectives. The State's adopted method of setting the amount of the non-custodial parent's obligation allows the Director, in the absence of a court order setting the amount, to set the amount at his discretion, not to exceed the public assistance paid to the non-custodial parent. It has been the Director's policy to set the amount of "state debt" in an amount equivalent to the total amount of public assistance paid out by the State. The State does not consider the financial situation of the non-custodial parent, nor does it in any way consider the facts of each individual child support enforcement case, as is required in the federally mandated formula. It is clear that Missouri's refusal to use the federal formula stands as an obstacle to the accomplishment of the full purpose and objectives of the Congressional mandate that federally funded state enforcement programs comply with federal standards. This Court concludes, under the *Capital Cities* test, that the Federal Regulations requiring the amount of support obligation to be set in accordance with a formula have preemptive force over the Missouri statute and the Director's enforcement policy.

The State's method of calculation does not comply with the Federal Regulations. It is the Director's policy, rather than the state statute itself, which is in direct conflict with the Federal Regulations. The fact that it is the state policy rather than the actual state statute which is in direct conflict does not affect the preemptive impact of the Federal Regulations. Established

policies concerning the application of the state statutes which conflict with federal mandates can also be preempted by Federal Regulations. The United States Supreme Court has stated:

> The criterion for determining whether state laws are so inconsistent that state law must give way is firmly established in our decisions. Our task is 'to determine whether, under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.' This requirement requires us to consider the relationship between the state and federal laws as they are interpreted and applied not merely as they are written.

Jones v. Rath Packing Co., 430 U.S. 519, 526, 97 S.Ct. 1305, 1310 (1977) (citations omitted).

The critical issue in a preemption analysis is whether Congress intended that federal regulation supersede state law. *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 106 S.Ct. 1890 (1987). This Court will examine the federal child support enforcement provisions in order to determine if Congress intended preemption. The Federal Regulations provide a comprehensive scheme for the recovery from the non-custodial parent of funds expended by the state and the federal governments. Federal statutes require as a condition for federal funding that the state child support enforcement program comply with the requirements in the Federal Regulations promulgated by the U.S. Department of Health and Human Services. 42 U.S.C. §§ 601, 652 & 654 (1989). The Federal Regulations specifically mandate that in those instances where there is no court order, the state shall set the amount recoverable "in accordance with a formula which meets the criteria prescribed in § 302.53." 45 C.F.R. § 302.50(b)(2) (1989). That formula requires consideration of factors such as the non-custodial parent's financial situation and the needs of the child for whom public assistance has been supplied.

The unambiguously-stated federal provisions clearly set out the intent of Congress when it enacted the child support enforcement provisions. The regulatory scheme enacted by Congress specifies that federal agencies oversee the state child support enforcement programs. 42 U.S.C. § 652 (1983 & Supp. 1990). State enforcement programs must comply with the specific requirements of the Federal Regulations, as a condition for receipt of federal funds. It is clear that it was not the intent of Congress that the state should establish its own methods and procedures, while still receiving federal funding, as Missouri has done. It is clear that Congress intended to preempt the field of child support enforcement in those states like Missouri which have elected to participate and receive federal funds.

The United States Supreme Court, when ruling on a Supremacy Clause challenge to a state AFDC law which conflicted with the Federal Regulations, did not even question the preemptive force of the federal AFDC laws. *Townsend v. Swank,* 404 U.s. 282, 285-86, 92 S.Ct. 502, 505 (1971). Nor shall this Court further question the preemptive force of the federal child support enforcement laws. It is clear to this Court that Congressional enactment of the federal child support enforcement provisions has positively required that state law be preempted in accordance with the *Rose v. Rose* standard for preemption of state domestic relations law. 481 U.S. 619, 625, 107 S.Ct. 2029, 2033 (1987) (citations omitted). Further, in accordance with the *Rose v. Rose* standard, this Court finds that the Director's policy of setting the "state debt" in an amount equal to the public assistance paid out does "major damage to clear and substantial federal interests." *Id.* (citations omitted). The Director's policy is preempted by the Federal Regulations requiring the use of a formula. As such, the State's policy and practice is invalid and unconstitutional.

C. Eleventh Amendment Immunity

Defendants correctly state, and plaintiff agrees, that the Eleventh Amendment bars recovery of money damages from the

state, or from a state official acting in his official capacity. *Edelman v. Jordan,* 415 U.S. 651, 662-68, 94 S.Ct. 1347, 1355-58 (1974). Defendant can, however, be sued in their official capacities for injunctive relief. *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441 (1908).

D. Defendant Henry as a Party in His Official Capacity

Defendant Henry asserts that he is not a party to this action in his individual capacity. This Court will restate the facts of this case, for clarity, in discussing whether defendant Henry is a party to this case in both his individual and his official capacities. When this suit was first filed, defendant Henry was the Director of the DCSE, and the complaint named defendant Henry in both his official and his individual capacities. In 1988 defendant Henry was replaced as Director of DCSE by defendant Rapps. The complaint was amended to add defendant Rapps in both his official and his individual capacities, but the amended complaint did not restate the capacities in which defendant Henry was being sued. In 1990, defendant Henry replaced defendant Rapps as Director, and once again defendant Henry is currently the Director of the DCSE.

The record indicates that Defendant Henry received the summons, complaint, notices, and acknowledgements on June 27, 1988, while he was still the Director of the DCSE. The complaint named defendant Henry in both his official and individual capacities. Defendant Henry was replaced in office by defendant Rapps on July 15, 1988. Defendant Henry answered the complaint on July 28, 1988, which was after he was no longer Director of DCSE. In waiting until July 28, 1988 to answer the complaint, defendant Henry failed to acknowledge receipt of the summons within the twenty days required by Rule 4(c)(2)(C) of the Federal Rules of Civil Procedure. Thereafter, plaintiff filed an amended complaint to join defendant Rapps, captioned: "William R. Rapps, individually and as Director of the Missouri Division of Child Support Enforcement and Michael R. Henry."

The complaint clearly was initiated against defendant Henry in both his individual and official capacities. Defendant Henry acknowledged receipt of a complaint which named him in both his individual and official capacities. The actions for which plaintiff seeks to hold defendant Henry liable were done while he was the Director of the DCSE, and capable of being sued in both his individual and official capacities. Additionally, at the time the amended complaint was filed, the only capacity in which defendant Henry could have been sued was in his individual capacity, as a former Director but not a current Director of DCSE.

For this Court to allow defendant Henry to evade a suit against him in his individual capacity would be to condone his use of delay tactics in order to avoid liability. Therefore, this Court will allow plaintiff to amend his complaint to include in the caption a statement that the action against defendant Henry is in his individual as well as his official capacity.

E. Absolute Immunity

Defendants Rapps and Henry contend that they are entitled to absolute immunity from damages in a civil action for deprivation of plaintiff's constitutional rights. Defendants assert that their actions as state officials are analogous to those of a prosecutor in a criminal proceeding and, therefore, judgment against them in their individual capacities is barred by absolute immunity.

Defendants cite *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894 (1978) in support of their proposition. The Court in *Butz v. Economou* extended the absolute prosecutorial immunity to those involved in an administrative proceeding before the United States Department of Agriculture. The Department had initiated an administrative hearing to revoke or suspend the registration of a commodity futures merchant. The *Butz v. Economou* court deemed absolute immunity necessary to permit officials to exercise their discretion free of intimidation or harassment by litigants. The court stated:

> We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune to damages.

Id. at 512-13, 98 S.Ct. at 2914.

However, the reasoning of *Butz v. Economou* does not apply to the case at bar. The action in the case at bar concerns the decisions of the Directors, defendants Rapps and Henry, not to use the federally mandated formula in setting the amount of "state debt" owed by the non-custodial parent. This decision was not adjudicatory in nature, but was purely administrative. Therefore, defendants Rapps and Henry are not entitled to absolute immunity in the case at bar.

F. Qualified Immunity

Defendants contend, in the alternative, that they are entitled to qualified immunity for damages and from the entire suit, under *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727 (1982). The *Harlow* court held that the doctrine of qualified immunity bars suit against public officials not only as to liability, but as to being subjected to a trial proceeding. The qualified immunity bar applies when the alleged conduct does not violate, under an objective standard of review, a clearly established statutory or constitutional right. *Id.* The inquiry concerns whether a right is clearly established as a matter of law. Whether that right is clearly established, in reference to an official's discretionary functions, must be determined by the court by reference to decisional law as it existed at the time the defendants are alleged to have violated plaintiff's rights. *Id.*

The issue for this Court is whether Mr. Skelton's right to have his child support arrearages calculated in accordance with the federally mandated formula was a clearly established statutory right. Defendants cite *Mitchell v. Forsyth,* 472 U.S. 511, 105

S.Ct. 2806 (1985) for the proposition that the law concerning child support enforcement was not "established" for the purpose of qualified immunity because the Supreme Court had not ruled on the preemptive force of the federal child support enforcement laws.

However, the fact situation in *Mitchell v. Forsyth* is clearly distinguishable from that of the case at bar. The *Mitchell* case involved the qualified immunity of United States Attorney General John Mitchell, who had authorized a warrantless wiretap. The Court held that Mitchell was entitled to qualified immunity because it was not clearly established at the time that such wiretaps were unconstitutional. *Id.* at 2818. The Court's decision was based on the fact that such warrantless wiretaps for the protection of national security historically had been authorized since World War II by Presidents Roosevelt, Truman, Eisenhower, Kennedy, Johnson, and Nixon. *Id.* The Court's decision was also based on the fact that the Supreme Court had not specifically ruled that warrantless wiretaps were unconstitutional. *Id.* The *Mitchell* Court concluded on these facts, that it was "anything but clear that these practices violated the Constitution . . . ." *Id.*

Unlike the facts situation in *Mitchell,* in the case at bar the federal statutes and regulations clearly require calculation of the "state debt" based on a formula. The only history of ignoring that formula and automatically setting the "state debt" at an amount equivalent to the amount of public assistance paid out was the original version of the state statute. The statute was amended to delete that very provision. The amendment occurred after initiation of a suit challenging that provision for noncompliance with the federal statute mandating the use of a formula. Therefore, the fact that the Supreme Court has not ruled on the preemptive force of the federal child support enforcement regulations is not determinative in the case at bar.

This Court must consider other factors when determining whether Mr. Skelton's right to have his child support arrearages calculated in accordance with the federally mandated formula was a clearly established statutory right for the purpose of qualified immunity. One factor is the language of the federal law itself. The requirements of 45 C.F.R. § 302.53 are not unclear or ambiguous on their face. The Federal Regulations clearly require the use of a formula when calculating the amount of support obligation, including arrearages.

Defendants admit that the Director of DCSE is responsible for administering the program of joint state/federal child support enforcement in Missouri. Defendants further admit that as Directors, they were responsible for the overall administration of DCSE, which included the agency's compliance with state and federal laws which pertain to such enforcement. The state plan requirements for the program are stated in 45 C.F.R. §§ 302.0-302.85. As reasonably competent Directors, the defendants should have known the federal law governing the joint state/federal child support enforcement program.

Defendants have not asserted that they were unaware of the federal requirements stating that a formula must be used in determining the child support arrearages owed by the non-custodial parent. Indeed, plaintiff's counsel states that he has filed three Supremacy Clause challenges to the procedure for calculation of the "state debt" against defendants Henry and Rapps. The first of these actions was filed in 1983. *Shipman v. Missouri Department of Family Services,* 588 F. Supp. 1293 (E.D. 1984), *vacated and remanded,* 782 F.2d 1048 (8th Cir. 1985).

The 1983 suit was based on the original Missouri statute which required that the Director set the amount of "state debt" in an amount equivalent to the public assistance paid out. After initiation of the *Shipman* case, the Missouri legislature amended

the statute in 1984. The amended statue allowed the "state debt" to be set at the discretion of the Director. After the amendment in 1984, the district court dismissed *Shipman* for mootness and lack of standing. The Eighth Circuit affirmed the dismissal. *Shipman v. Missouri Department of Family Services*, 877 F.2d 678 (8th Cir. 1989).

A reasonably competent director of a state department should be aware of federal laws governing the actions of his department. Further, the prior litigation challenging the same DCSE procedure being challenged in the case at bar imputes knowledge to both Directors that the DCSE policy was not in compliance with the Federal Regulations. Therefore, this Court holds that there is no apparent basis for defendants' assertion that they are entitled to qualified immunity.

This Court notes that the state law prior to 1984 mandated that the Director set the amount of "state debt" at an amount equal to the public assistance paid out by the state. Any actions taken by the DCSE Director pursuant to the pre-1984 statute were taken pursuant to statutory mandate. Therefore, the Director is entitled to qualified immunity for any actions taken prior to the 1984 amendment to the statute.

G. Doctrine of Respondeat Superior

Defendants state that they had no direct or personal knowledge of the assessment and enforcement of the "state debt" against plaintiff Skelton, but that DCSE employees assessed and enforced the "state debt" against Mr. Skelton. Defendants argue that, therefore, they are not liable because the doctrine of *respondeat superior* does not apply to lawsuits under 42 U.S.C. § 1983. *Glick v. Sargent*, 696 F.2d 413, 414 (8th Cir. 1983).

The doctrine of *respondeat superior*, however, is not at issue in the case at bar. The action for which plaintiff Skelton seeks to hold defendants Rapps and Henry liable is their refusal to

adopt the federally mandated formula for calculation of child support arrearages owed as "state debt." Defendants admit that as Directors of the DCSE that they were responsible for adopting policies and regulations necessary or desirable to carry out the provisions of the child support enforcement program. Mo. Rev. Stat. 454.400(2)(6) (Supp. 1990). Liability in the case at bar is not based on the acts of the employees of defendants Rapps and Henry, but is based on the decision made by the Directors not to use a formula for the calculation of the "state debt." The doctrine of *respondeat superior* is not at issue in the case at bar.

H. Due Process

Plaintiff's complaint also makes a due process claim for violation of the Fourteenth Amendment of the United States Constitution. This Court has determined that the Director's policy of setting the "state debt" in an amount equal to the public assistance paid out violates the Supremacy Clause. Therefore, because this case has been determined on other grounds, this Court will not rule on the validity of the due process claim at this time.

III. CONCLUSION

This action challenges the State's method for calculating child support arrearages owed to the State by the non-custodial parent as reimbursement for public assistance paid out to the custodial parent. The federal mandate that child support arrearages be calculated in accordance with a formula clearly preempts the DCSE Director's policy to set the amount of arrearages in an amount equal to the amount of public assistance paid out. As such, the policy is in violation of the Supremacy Clause of the United States Constitution. This Court must grant summary judgment in favor of plaintiff Terry Skelton on the issue of liability for violation of the Supremacy Clause.

This Court also finds that defendants are not entitled to either absolute or qualified immunity. This Court notes that rejection

of a claim for qualified immunity is immediately appealable. *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806 (1985).

It may also be found by the Appeals Court that his Court's rulings on the parties' motions for summary judgment are sufficiently related to the immunity question as to be immediately appealable. *See Moreno v. Small Business Administration,* 877 F.2d 715, 716 (8th Cir. 1989). Given the dearth of case law in this area, however, this Court additionally finds that there is substantial grounds for differing opinions on the issues before this Court and that an immediate appeal from this order will significantly advance the ultimate termination of litigation on these matters. This Court will, therefore, certify its orders concerning summary judgment for immediate appeal pursuant to 28 U.S.C. § 1292(b).

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is denied. It is further

ORDERED that plaintiff's motion for summary judgment on the issue of liability is granted. It is further

ORDERED that plaintiffs have leave of this Court to amend their complaint to name defendant Michael R. Henry in both his individual and his official capacities. It is further

ORDERED that all administrative judgments setting the "state debt" entered by the Department of Child Support Enforcement, its Director, or predecessor agencies, prior to compliance with 45 C.F.R. § 302.53, are null and void. It is further

ORDERED that the current Director of the Missouri Department of Child Support Enforcement shall promulgate a method to be used for the calculation of the "state debt" which shall be in compliance with the Federal Regulations, 45 C.F.R. § 302.53, as stated in this order. It is further

ORDERED that the current Director of the Missouri Department of Child Support Enforcement is enjoined in the future from arbitrarily setting the amount of "state debt" in an amount equal to the amount of public assistance paid out, without taking into account the factors in the federally mandated formula, as stated in this order. It is further

ORDERED that plaintiff's counsel shall be awarded attorney's fees and costs under 42 U.S.C. § 1988, in an amount to be determined after a disposition on monetary damages. It is further

ORDERED that the issues decided in this order which are not otherwise entitled to immediate appeal are certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). It is further

ORDERED that by agreement and stipulation of the parties, the Director of the Missouri Department of Child Support Enforcement will refrain from filing any new actions for collection of administratively determined "state debt" until resolution of this matter on appeal. It is further

ORDERED that by agreement and stipulation of the parties, the Director of the Missouri Department Support Enforcement will locate and stay all current actions for collection of administratively determined "state debt" on or before December 31, 1990, and such stays will remain in effect until resolution of this matter on appeal. It is further

ORDERED pursuant to 28 U.S.C. § 1292(b) that further action on this case is stayed pending disposition of defendants' stated plan to appeal this action.

/s/ SCOTT O. WRIGHT
United States District Judge

August 22nd, 1990.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2604WMJC
No. 90-2605WMJC

Glenda Jackson, individually
and on behalf of other similarly situated,
Appellee,

vs.

William R. Rapps, individually and as Director
of the Missouri Division of Child Support Enforcement,
Appellant.

* * * *

Terry Skelton,
Appellee,

vs.

William R. Rapps, Individually and as Director
of the Missouri Division of Child Support Enforcement,
Appellant.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judge Loken voted to grant rehearing en banc.

Rehearing by the panel is also denied.

January 9, 1992

APPENDIX E

42 U.S.C. § 602(a)(26)(A), (27) (1988)

A state plan for aid and services to needy families with children must —

* * *

(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required —

(A) to assign the State any rights to support from any other person such applicant may have (1) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed;

* * *

(27) provide that the State has in effect a plan approved under part D of this subchapter and operates a child support program in substantial compliance with such plan;

42 U.S.C. § 656(a)(1) and (2)(A), (B) 1988

(a)(1) The support rights assigned to the State under section 602(a)(26) of this title or secured on behalf of a child receiving foster care maintenance payments shall constitute an obligation owed to such State by the individual responsible for providing such support. Such obligation shall be deemed for collection purposes to be collectible under all applicable State and local processes.

(2) the amount of such obligation shall be —

(A) the amount specified in a court order which covers the assigned support rights, or

(B) if there is no court order, an amount determined by the State in accordance with a formula approved by the Secretary,

45 C.F.R. § 302.50 Support Obligations (1989)

The State plan shall provide as follows:

(a) The support rights assigned to the IV-D agency pursuant to § 232.11 of this title or section 471(a)(17) of the Act constitute an obligation owed to the State by the individual responsible for providing such support. Such obligation shall be established by:

(1) Order of a court of competent jurisdiction,

(2) Other legal process as established by State laws, such as an administrative hearing process or a legally enforceable and binding agreement;

* * *

(b) The amount of the obligation described in paragraph (a) of this section shall be:

(1) The amount specified in the order of a court of competent jurisdiction which covers the assigned support rights; or

(2) If there is no court order, an amount described in writing by the IV-D agency as part of the legal process referred to in paragraph (a)(2) of this section in accordance with a formula which meets the criteria prescribed in § 302.53.

45 C.F.R. § 302.53 Formula for determining the amount of the obligation (1989)

The State plan shall provide as follows:

(a) There shall be a formula to be utilized by the IV-D agency in determining the amount of the support obligation pursuant to § 302.50 when there is no court order covering the obligation. Such formula must take into consideration the following criteria:

(1) All earnings, income and resources of the absent parent including real and personal property;

(2) The earnings potential of the absent parent;

(3) The reasonable necessities of the absent parent;

(4) The ability of the absent parent to borrow;

(5) The need of the child for whom support is sought;

(6) The amount of assistance which would be paid to the child under the full standard of need of the State's IV-A plan;

(7) The existence of other dependents; and

(8) Other reasonable criteria which the State may choose to incorporate.

(b) The formula described in paragraph (a) of this section must be designed to insure, as a minimum, that the child for whom support is sought benefits from the income and resources of the absent parent on an equitable basis in comparison with any other minor children of the absent parent.

(c) The formula described in paragraph (a) of this section shall be utilized to determine the required monthly support obligation, the amount of support obligation arrearage, if any, and the amount to be paid periodically against such arrearage.

45 C.F.R. § 303.53 [Removed] 1991

4. Section 302.53 is removed.

5. In section 302.56, paragraphs (a) through (c) are revised and paragraphs (e) through (h) are added, to read as follows:

45 C.F.R. § 302.56 Guidelines for setting child support awards (1991)

(a) Effective October 13, 1989, as a condition of approval of its State plan, the State shall establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support award amount within the State.

(b) The State shall have procedures for making the guidelines available to all persons in the State whose duty it is to set child support award amounts.

(c) The guidelines established under paragraph (a) of this section must at a minimum:

(1) Take into consideration all earnings and income of the absent parent;

(2) Be based on specific descriptive and numeric criteria and result in a computation of the support obligation; and

(3) Provide for the child(ren)'s health care needs, through health insurance coverage or other means.

(d) * * *

(e) The State must review, and revise, if appropriate, the guidelines established under paragraph (a) of this section at least once every four years to ensure that their application results in the determination of appropriate child support award amounts.

(f) Effective October 13, 1989, the State must provide that there shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of the guidelines established under paragraph (a) of this section is the correct amount of child support to be awarded.

(g) A written finding or specific finding on the record of a judicial or administrative proceeding for the award of child support that the application of the guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. Findings that rebut the guidelines shall state the amount

of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.

(h) * * * As part of review of a State's guidelines required under paragraph (e) of this section, a State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from, the guidelines: The analysis of the data must be used in the State's review of the guidelines to ensure that deviations from the guidelines are limited.

Missouri Revised Statutes § 454.465-1(1)(2), (1986)

State debt, defined, how calculated—rights of family services regarding state debts—rules, promulgation and suspension—service of process, procedure.—1. For purposes of sections 454.460 to 454.505, a payment of public assistance by the division of family services to or for the benefit of any dependent child, including any payment made for the benefit of the caretaker of the child, creates an obligation, to be called "state debt", which is due and owing to the department by the parent, or parents, absent from the home where the dependent child resided at the time the public assistance was paid. The amount of the state debt shall be determined as follows:

(1) Where there exists a court order directed to a parent which covers that parent's support obligation to a dependent during a period in which the division of family services provided public assistance to or for the benefit of that dependent, the state debt of that parent shall be an amount equal to the obligation ordered by the court, including arrearages and unpaid medical expenses, up to the full amount of public assistance paid; or

(2) Where no court order covers a parent's support obligation to a dependent during a period in which the division of family services provided public assistance to or for the benefit of that

dependent, the state debt may be set or reset by the director in an amount not to exceed the amount of public assistance so provided by the division of family services. * * *

Missouri Revised Statutes § 454.480 (1986)

Minimum support obligations, formula for establishing.— In order to assist in determining the amount that a parent shall be ordered to contribute toward the support of a dependent child, the department shall establish by regulation a scale and formula for determining minimum support obligations. The scale and formula shall take into account the following factors:

(1) All earnings and income resources of the parents, including real and personal property;

(2) The reasonable necessities of the parent;

(3) The needs of the dependent child for whom support is sought;

(4) The amount of public assistance which would be paid to the dependent child under the full standard of need of the state's public assistance plan;

(5) The existence of other dependents, except that the dependent child for whom support is sought shall benefit from the income and resources of the parent on an equitable basis in comparison with any other dependent of the parent;

(6) Other reasonable criteria which the department may choose to incorporate.